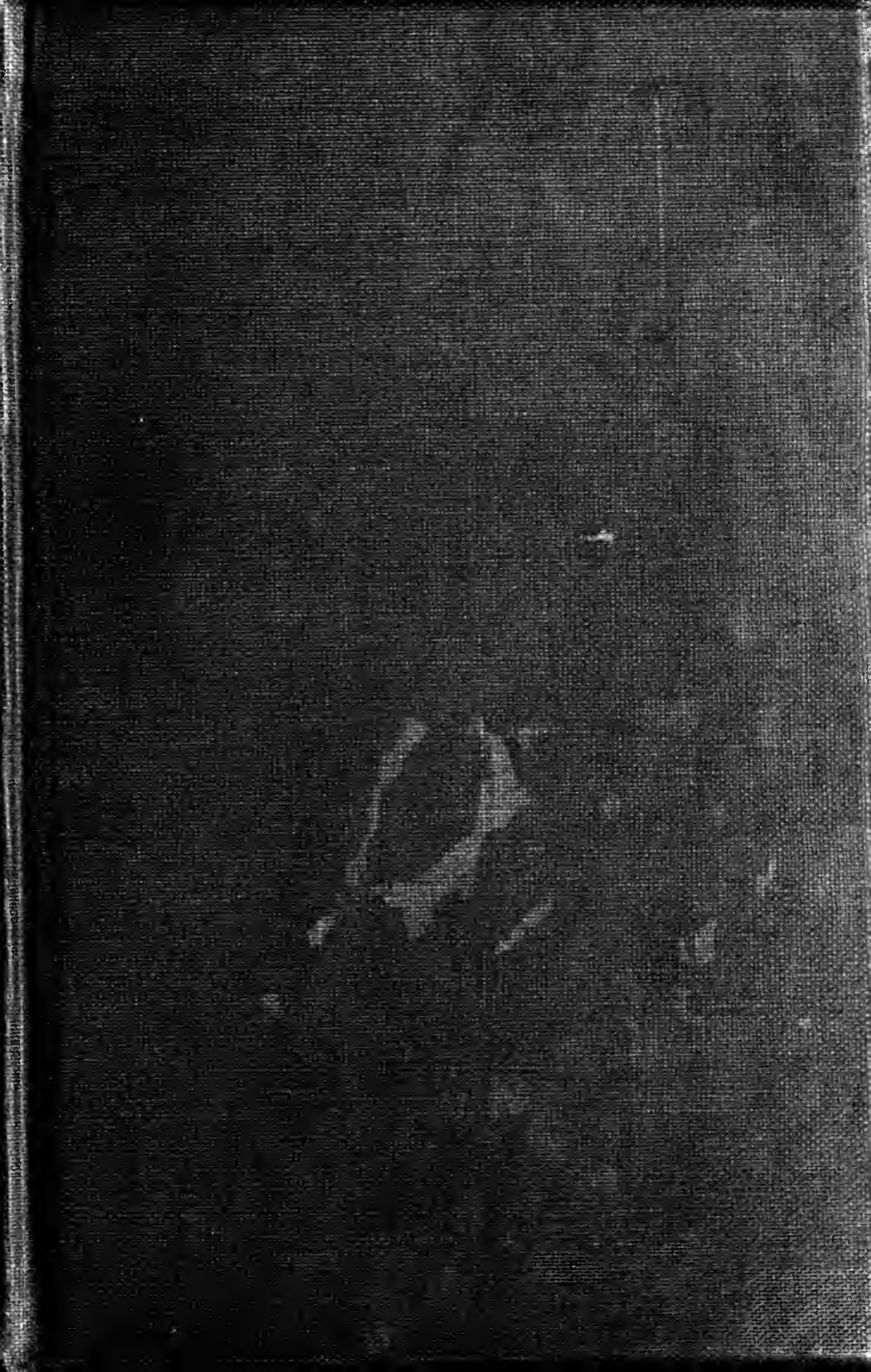


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# POINTS OF VIEW

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BY

VISCOUNT BIRKENHEAD

LORD HIGH CHANCELLOR OF GREAT BRITAIN

IN TWO VOLUMES

VOL. I

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# PREFACE

THE Papers, Essays, and Criticisms contained in these volumes mostly appear for the first time. There are, however, some exceptions. Two Speeches are reprinted. The first dealt with the Reform of our Divorce Laws, and it appears here because I am deeply concerned to place on record my individual repudiation of the inhuman and immoral system under which we live. The second was concerned with the reconstitution of Europe, was addressed to the International Chamber of Commerce, and anticipated, I am bold enough to think, the Policy of Genoa in its more promising aspects.

Of the other Papers, two are Military. One is concerned with Lord Kitchener. Lord Kitchener was my friend. He never failed to show me kindness, and, I will even add, affection, at the moment of his greatest power. Lord Esher, a distinguished writer, observer, and man of affairs, has published an estimate of Lord Kitchener which I believe to be fundamentally unsound. Not all the respect and kindness which I feel for Lord Esher can prevent me from placing plainly

on record my own view of the part played and the qualities shown by Lord Kitchener.

The second Military Paper is concerned with the Battle of Le Cateau. I naturally offer my views upon this debated subject with much diffidence. But I had occasion, when in France, to study the subject deeply, and I have been careful to keep myself abreast of everything which has been written with authority since. I have no doubt whatever that Lord French—if I may for a moment use his old name—did as much injustice to General Smith-Dorrien in his book as he did justice in his Contemporary Despatch. I feel bound to place on record the conviction which I have formed and the reasons upon which it is founded.

The two Essays upon "A Ministry of Justice" and "Judges and Politics" should be read together. There has been much undigested talk among those who are unaware of, or have not sufficiently considered, the difference between Latin systems of legal organisation and our own, as to the necessity of a Ministry of Justice. I am sanguine enough to believe that, in impartial and competent minds, the views under consideration will not survive the study of these Articles.

I have not, in the Essay on "Judges and Politics" elaborated, as otherwise I should have done, the reasons for retaining the anomalous

office of Lord Chancellor, because the two Essays, read together, provide the full material.

The Essay on "Fusion" must, of course, be read and judged in relation to the date at which it appeared. I have as little doubt now as to the wisdom of that which I wrote, as I had when I wrote it. The future alone can show whether I was right, or whether—if I was right—it is too late to recapture the path of sanity.

It remains only to say a word of the personal sketches which are collected in this volume. Sir Samuel Evans, Mr. Neil Primrose, Colonel Jack Scott, Mr. Edward Horner, were all near and dear friends of mine. I have collected—and in some cases a little elaborated—that which I wrote of them when they died. In discharging a pious duty, I have given myself a melancholy pleasure, and I hope that the friends of the Great Dead may in some cases be a little comforted by that which I have written.

BIRKENHEAD.

CHARLTON, *September* 1922.

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# I

## LORD ESHER AND LORD KITCHENER

*The Tragedy of Lord Kitchener* is written with all Lord Esher's well-known literary skill. It contains many charming passages. It does not lack, in places, the attraction of a penetrating subtlety. It is apparently, and indeed I think evidently, intended on the whole to be friendly to Lord Kitchener's memory. But it is nevertheless a book which will be read with profound dissatisfaction by every friend of Lord Kitchener. I.

Some one—I cannot remember who—a long time ago dismissed a German biography, of which Chatham was the victim, as the effort of an owl blinking at an eagle. Lord Esher is not by any means an owl. But his monograph leaves upon the mind the painful impression that, in just perspective, he has failed to understand and value an indomitable Englishman, who was his friend, and who died for England.

It is my purpose to establish this fact and to counteract, as far as I can, the general tendency and effect of Lord Esher's monograph. If one portrait be displaced, plainly another must be substituted. With much self-distrust I attempt an alternative sketch. I conceive of Lord

I. Kitchener, when every proper qualification is made, as one of the great outstanding figures of the War. That he had intellectual limitations is certain. Who has not? That he made mistakes in the War is undisputed. Who did not? But I have no doubt that, in comparison with him, every contemporary military figure in the Empire will shrink into insignificance; and it is, in my judgment, at least as certain that in that undefined and rarefied atmosphere in which alone those breathe from whom, in dreadful days, radiate courage, confidence, and hope, the stature of Kitchener, though for widely different reasons, will loom in history as conspicuous as that of Foch.

I am very conscious that many others could have replied with greater authority than I to Lord Esher's impressions.

A careful study of Sir George Arthur's minute and "documented" work would in itself have corrected some grave misconceptions. But I have some qualifications which I will be bold enough to state plainly. Lord Kitchener honoured me with his friendship before the War. On the day of the ultimatum he and the First Lord of the Admiralty, acting together, appointed me Director of the Press Bureau. Thereafter for six weeks I saw him every day, including Sundays, except when he went to France. I was seldom with him for less than half an hour on each occasion. At every visit he gave me his view of the actual situation, and then we discussed at length the form of the public announcements which it was proper to make. It may be noted here in passing that he was entirely free from the paltry imbecility

which marked every decision of the censorship at G.H.Q. in France. His criterion was a simple one. Will the publication of that which is true aid the enemy by giving him information otherwise unattainable or at least difficult of attainment? He laughed at the apprehension that bad news would dismay the people of England. When I went to France he permitted, and indeed encouraged, me to correspond with him. I never came home on leave without dining with him. When I became a Minister in 1915 the intimacy between us continuously strengthened, and I permit myself the egotism of recalling the note in Sir George Arthur's book that Kitchener observed more than once, on his return worn out to his office after a series of critical Cabinets: "F. E. has been a comfort in Cabinet to-day." I.

I am bold enough to think, in view of these circumstances, that, in the absence of another, I may reasonably attempt to impeach the main thesis, as I understand it, of Lord Esher's book. I propose to state it mainly in his own language and then give reasons for supposing it to be partial, superficial, and indeed essentially wrong and unfair.

But before I address myself to this task, which appeals to me as a pious duty, some preliminary observations dealing with less important matters may properly be made. The critic of a great man, who happens to be dead, should be most meticulously accurate in dealing with such matters of fact as are readily ascertainable. If in stating them he falls into errors which are easily avoidable, we shall do well to examine his larger

I. generalisations with scrupulous and even critical industry. Lord Esher's book does not support this test very successfully. A few illustrations of his flippancy in this respect may perhaps be usefully given. It is of course beside the point that in the particular case it may not much matter whether Lord Esher is accurate or not. Upon the lips of a historian a positive mis-statement of fact invites inference, and suggests caution.

On page 7 Lord Esher states that General Gordon talked to him about Lord Kitchener, who was " at that time 35 years old." In fact General Gordon left England for ever when Lord Kitchener was 33, and perished at Khartoum when Lord Kitchener was 34.

Elsewhere Lord Esher speaks of Lord Kitchener as " half an Irishman." In fact neither of Lord Kitchener's parents was Irish.

At page 28 Lord Esher says that Queen Victoria " was not in October 1903 favourably inclined to Lord Roberts' suggestion that Lord Kitchener should go to India as Commander-in-Chief." In fact Queen Victoria had in October 1903 been dead for nearly three years, and Lord Kitchener had been in India for nearly a year. This is a strange lapse on the part of the editor of Queen Victoria's correspondence.

In another place Lord Esher alludes (with an implication a little displeasing) to Lord Kitchener as growing heavier in body during the War. In fact he grew almost continuously thinner and lighter. Care and anxiety produced this change. In itself the circumstances would not be worth recording. But it is disagreeable to find a state-

ment to the opposite effect, wholly unfounded, used in faint reinforcement of the suggestion that he became mentally immobile. 1.

At page 169 Lord Esher says, " the truth being that Lord Kitchener had walked over, as his custom was, from York House to inform the King of his departure (for the Dardanelles) and ask his leave to go." In fact Lord Kitchener *never* walked from York House to Buckingham Palace, and on this occasion sent word to Lord Stamfordham that he had nothing of sufficient importance to warrant a request for audience. The reply was a gracious summons to the King's sick-room, which was obeyed in a motor-car.

At page 108 Lord Esher says, " By March 1915 static conditions in the West had been reproduced in the East, and a state of siege had begun in Gallipoli." In fact not even the landing at Gallipoli had taken place in March.

A more serious and general mis-statement is that Lord Kitchener would have liked to launch every man and gun he could beg, borrow, or steal from the Western front for an attack in the Near East. This allegation is fantastic and baseless. Upon what authority is it made ? In what conversation, and with whom, was this wish expressed ? In what document was it recorded ? By what act or decision was it illustrated ? Lord Kitchener's mind reasonably varied, with the fluctuating fortunes of the War, as to whether at a particular moment a particular reinforcement should go East or West, but he was never either for East or West. He looked, among the soldiers almost alone, on the war as an indivisible whole ;

I. and there never was a moment when he did not realise that our position in the West must be immensely strong.

Lord Esher's handling of the munitions controversy is one of the most surprising features of a surprising essay. He is apparently wholly unaware of the literature and the documents which now illustrate, and control judgment upon, the subject. He seems to accept Lord French's account of the series of incidents in question as authentic and—what is even more surprising—to approve ethically of the extraordinary and grossly improper steps which the then Commander-in-Chief thought himself justified in taking. In fact, nothing in the history of the War is more clearly established than the tardiness of the discovery by Lord French and his Staff (1) of the part which high explosives were destined to play, and (2) of the unimaginable scale upon which ammunition of all kinds was to be required. The battle of Neuve Chapelle was just as much an education, if we are to be frank, to Lord French as it was to Lord Kitchener, and the former ought to have required it much less than the latter. Extravagant expectations were formed at G.H.Q. as to the result of the proposed operations, and were announced with garrulous sanguineness. The reaction was violent and general. The blame for the failure was unlikely to be placed by the Commander-in-Chief upon the shoulders of himself and his Staff; for their plans were conscientiously carried out, and nevertheless almost completely failed. Still less could it be charged upon any defect on the part of the troops engaged.

The Indian Corps under General Willcocks played its part with desperate valour; General Rawlinson's troops carried their assault to the extreme limit of that which was attainable. The battle was on the whole a failure; and in relation to the hopes entertained, and freely expressed, it was even a ludicrous failure. But G.H.Q., instead of recognising this fact, elected in the first place to claim a success. The *Daily Mail* was justified upon the official announcement in placarding England (as it did) with the exultant claim, "Victory at last." To those who knew the truth the impression was poignant, pathetic, and exasperating. It could not survive the first-hand information of those who visited England on leave; and the complete barrenness of result, and the extent of the casualties, soon stared the nation in the face. It became necessary for those who had first predicted, and then announced, success to explain how it was that they were unable to deliver any goods at all. In this dilemma they resolved very greatly *to ante-date their own realisation of the immeasurable need of high explosives.* The means adopted were as lacking in propriety as the attempt itself in candour. At the period in question war correspondents were not allowed to accompany the Allied armies. The decision may have been right or it may have been wrong; I do not argue it here. But it was pressed upon us by the French, accepted whole-heartedly by our Staff in France, and more doubtfully by Lord Kitchener, who had to face political colleagues and deputations of journalists. Lord French certainly—and perhaps

I. at the moment quite rightly—refused to lift a finger on behalf of the war correspondents. If such a person—as here and there happened—crept stealthily into the zone of the armies, he was swiftly and contemptuously extruded. Nor did the circumstances of the moment afford Lord French any excuse for departing from the correctitude of official channels. His Chief was not a civilian. He was a Field-Marshal. He was his old Commanding Officer. With Brutus he might reasonably have claimed :

> I am a soldier, I
> Older in counsel; abler than yourself
> To make conditions.

There was no soil here for the contempt so freely expressed (in war-time) by generals for politicians. Man to man, soldier to soldier, Field-Marshal to Field-Marshal, the facts could have been, and should have been, frankly reported. The reputation of Lord French and the character of Lord Kitchener should have made unthinkable the employment of an unofficial third party for the purpose of conveying messages to civilians equally unofficial. It was always within the power of Lord French to ensure the communication of any report to the Cabinet as a whole. Nor do I believe that there is on record a single case in which Lord Kitchener withheld from his colleagues any report or complaint from Lord French which the latter desired to make known. How in these circumstances did Lord French deal with the situation ? In a method happily, so far as I am aware, without precedent in any other war, and without copy in this. Colonel

Repington—the *Times* war correspondent—was in the month of May staying as a guest at G.H.Q. By Lord French's direction, an *ex parte*, and extremely polemical, brief was given to him placing the whole blame for the failure not only of Neuve Chapelle (hitherto a victory) but also of Festubert, upon the shortage of high explosives, and the whole blame for the shortage of high explosives upon Lord Kitchener. In the case of Festubert the suggestion was specially outrageous, for Lord French had himself written to Lord Kitchener a few days before the engagement: "The ammunition will be all right." The case was of course intended to be made, as it was in fact made, with a shriek to the whole world. Newspaper correspondents were not allowed by the Commander-in-Chief in France; but a particular newspaper correspondent was subterraneously supplied by the Commander-in-Chief with journalistic high explosive (of which happily there was no shortage) for the purpose of destroying his superior. Supposing that a course so indecent had been adopted by the second-in-command of a battalion in relation to his colonel, what would have been Lord French's judgment upon him? Or—for the skin is closer than the shirt—suppose that Lord French's Chief of the Staff had availed himself of Colonel Repington's aid to expose in the Press supposed or perhaps even real defects in his Chief, what would have been that Chief's verdict? Would Lord French have accepted the justification that in the opinion of his subordinate it was impossible to win the War unless a change was made in the highest

I. command? Is discipline—without which armies perish—maintainable at all if those in high places set an example so pernicious? Lord Esher sees nothing really reprehensible in Lord French's action. "It was done openly," he observes tolerantly. Was it? Did Lord French inform Lord Kitchener of the steps which he was taking? Did he inform the Prime Minister that he—a soldier in the field—was taking active steps to destroy his Government? Napoleon in Italy was more considerate of the Government in Paris.

The singular complacency and simplicity with which Lord French makes known his discharge of a rôle so unattractive is one of the most puzzling incidents in a psychological dilemma. If the shortage of shells was grave enough to justify methods so repulsive and unsoldierly, it was known, or it should have been known, to Lord French and his Staff weeks before the battles of Neuve Chapelle and Festubert took place. It was known, or it should have been known, at the moment when they were predicting (and later announcing) victory. If it was known when it should have been known, it was the duty of Lord French to come home (as he not infrequently did) and insist upon explaining to the whole Cabinet the desperate situation which had arisen. And if this opportunity were denied him, or his warnings were flouted, it was still open to Lord French to resign his command, and inform his countrymen of the reasons which had impelled him to this step. The truth of course is known to all students of this period of the war, and is established at every stage by the documents.

Lord French and his Staff realised very late in the day both the need of substituting high explosives for shrapnel and the growing scale upon which modern war demanded the supply of both. If Lord French had realised these facts in time he would quite certainly have postponed (as he easily could have done) the futile battle of Neuve Chapelle. If he realised them imperfectly and tardily (as he certainly did) how could a more complete, or an earlier, realisation be expected from Lord Kitchener? Nothing in Lord Kitchener's career was greater than the serene and noble composure with which he endured a Press campaign against himself, instigated by his subordinate, and incredibly wounding to his dignity. I.

The greater man the greater courtesy.

Lord Esher's criticisms of the Field-Marshal upon the subject of compulsory service bring me to more disputable ground. But here again I think Lord Esher unfair, and insufficiently informed as to the facts. When the War began, Lord Kitchener, a soldier, accepted a political office. He was wholly ignorant of domestic politics. His life had been spent elsewhere. His training had been in other schools. He found himself sitting in council with men who were politicians to their finger-tips, but who, to do them justice, were as anxious to win the War as he was himself. It is certain that until the first Coalition was formed there was no chance whatever that the Cabinet would adopt conscription, and it is universally admitted that

I. organised Labour would have most bitterly resisted it. Even highly experienced politicians, at a later stage, made strange miscalculations as to feeling in the country upon this question. It can, for instance, hardly be supposed that Sir John Simon expected to leave the Cabinet alone, when at a later period compulsion became law. I am not — it must be understood — arguing whether or not the necessary steps should have been taken earlier. I struggled for them myself from the moment that I became a Cabinet Minister. But I am examining the responsibility of Lord Kitchener, who on the day war was declared would probably not have found in the Cabinet a single friend for compulsory service except Mr. Churchill. So long as he obtained the necessary recruits it was almost inevitable that he should submit to the guidance of politicians upon the political issue whether they should be supplied in one way or another; and it is of course notorious that in the earlier days of the War the difficulty was not to obtain recruits, but to clothe, shelter, and arm them. At a later period it became evident that the voluntary method, besides being grossly unfair — which in my judgment was, in the circumstances, more a matter for Lord Kitchener's colleagues than for himself—was certain to prove inadequate. I saw him upon the subject in June or July of 1915—I think July—when he told me that he had no doubt that it would be necessary for him to ask for compulsion in the first days of 1916. Later in the year he told me that he had definitely arranged with Mr. Henderson that

there would be no organised Labour opposition in January if he assured the country, as he intended to do, that conscription had now become absolutely necessary in order to procure reinforcements for the firing line. It is possible to think that Lord Kitchener should have acted sooner. But it is necessary to remember that his feet were set in unfamiliar political shoals. It may have been the duty of a Prime Minister—I do not discuss the point here—to risk the unity of the nation. It cannot, I think, be said that it was the duty of a soldier, unless and until it became clear that without compulsion he could not obtain the indispensable recruits and must in consequence lose the War.

There is something in detail to be said for the view that this period had not arisen, and would not have arisen, until the date fixed by Kitchener; though I myself took, and take, a different view. When he informed me in the autumn of 1915 of the result of his conversations with Mr. Henderson, I told him that he greatly overrated the political difficulties, and that conscription could be introduced without any other consequence than one or two negligible defections.

Lord Esher founds a grave disparagement upon Lord Kitchener's action or inaction in this matter. At page 147 he says, "During the debates on the question Lord K.'s colleagues thought him irresolute and unsteady . . . the miasma of Downing Street acted upon him like a spell. He procrastinated; counted heads and weighed authorities; he attempted to deliberate and refused to act. . . . Lord K. stubbornly refused

I. to become the arbiter of the situation. His colleagues—except Mr. Asquith, who had least reason to do so—never forgave him. . . ."

I was at this time a Cabinet Minister, co-operating closely with my Unionist colleagues, aided by Mr. Lloyd George and Mr. Churchill (until the latter resigned), in the cause of compulsory service. I recognise very little truth in the above passage. But what is the meaning of the curious reference to Mr. Asquith? Does it mean that Mr. Asquith had a grievance against Lord Kitchener because the latter would not give the lead which the former wanted? If it means this it is absolutely untrue. If it does not, it means nothing.

I select next a surprising dictum of the author to the effect that Lord Kitchener perhaps never trusted any one. This again is grotesquely untrue. He was extremely slow in giving confidence; but when he trusted he gave everything. Does Lord Esher think Lord Kitchener did not trust, for instance, Colonel Fitzgerald? or Sir George Arthur? Does he know that Sir David Henderson wrote of him just before his death: "I have never dealt with a Senior Officer who took me so much into his confidence and gave me his opinion so frankly as Lord Kitchener." A dozen instances to the contrary could be cited out of my own knowledge. Others who knew him could multiply the list indefinitely. Of all the sweeping statements made by Lord Esher this is one of the least defensible.

I have up to the present dealt with certain minor, though not unimportant, matters which

enable us to test either the accuracy, or the fundamental fairness, of Lord Esher's treatment of his subject. When I talk of fairness I exclude of course the slightest tinge of conscious unfairness. I mean always that the impression, however honest subjectively, is in my judgment objectively unfair. I.

I come now to what I think may reasonably be described as the author's larger thesis. I will attempt to state it without exaggeration and without malice.

It is that there was years ago a Kitchener, lean, vigorous, enduring, strong as steel, who gave his youthful prime to the Empire in days long past. The exploits of this soldier, almost legendary in their brilliant steadfastness, are on record in the sun-swept deserts of the Sudan, in the block-houses with which he studded—for its conquest—the sullen veldt, and in the pigeon-holes at the India Office which record his triumph over an imperious Viceroy. Upon the shoulders of this man (the theory continues), now grown a little old, a little inert, there was laid in later days a burden of intolerable weight. With courage high and unbroken he tottered in the throes of a crisis beyond example. He showed rare flashes of insight and premonition. He achieved much; but in relation to all that called for achievement it must, upon a sober balance, be written down that he failed. And it is the tragedy of this career that its supreme opportunity came only when its highest powers had already waned.

This is not, I think, an unfair statement of Lord Esher's central proposition, and it is emphasised

1. (especially upon the cover, and by the publishers) through the medium of two photographs. One of them exhibits the soldier in his vigorous and early middle age. The other presents the familiar features of the Secretary of State in the first days of the Great War.

I have the misfortune to dissent profoundly from the view which the author attempts to render plausible; and I am as unmoved by his photographic as by his argumentative processes. Indeed, the two photographs have produced upon my mind an impression which I conceive to be precisely the opposite to that intended. The younger man is no doubt keen enough in appearance, but he is lacking in weight and dignity. The impression is, on the whole, merely of a young and alert officer, hard in condition, and wearing a moustache a little heavier than the mode of to-day prescribes. The later picture leaves upon me a different and a far deeper impression. Here are to be seen in mature and noble development the lineaments of a stately Englishman. "Here is a man," one may well say, "suited to the helm when the hurricane rages: fit to give expression in action to the defensive impulse of a mighty Empire."

Let me give clear proof that I do not exaggerate the kind of subtle (often it may be unintentional) disparagement which Lord Esher contrives to suggest:

Page 10. "His mind had ragged edges which led to the confusion of his own ideas and to chaos in much which he undertook to accomplish."

Page 30. "In this novel sphere (the War

Office) he was baffled and lost confidence in himself." I.

Page 70. "You walked away from K.'s room feeling that though our system of conducting a great war was misguided, and he knew it, yet he was no longer the K. of K. qualified to find a remedy . . . his figure had grown heavy: his face had lost its outline; he was over 65 years old."

Page 104. "During the early months of 1915, which under circumstances more adapted to a full manifestation of his peculiar gifts might have proved to be the grand epoch of his life, his steps began to falter and his influence to wane."

Page 149. "When suddenly this soldier of autocratic temperament and Eastern tradition found himself seated at a table with twenty colleagues . . . he shrank into obstinacy and silence. . . . But he was not always silent. At times he was driven into an unconsidered flow of talk more exasperating to his colleagues than his reserve. His form of speech was Cromwellian in its obscurity and incoherence."

Page 215. "Reckoned to be firm and resolute and strong he was certainly at times all three, but he was also during the last years of his life often malleable and irresolute. Silent, reserved, and secretive, he was certainly at times all three, but he could also be garrulous and self-revealing."

Page 214. "To the poet's vision the tragedy of Hamlet lay in the hero's consciousness of his own irresolution and not in the holocaust of death amid which the play ends. Lord Kitchener's tragedy was not dissimilar, inasmuch

I. as he realised that the qualities of mind and character which had served him well through life were under these entirely new conditions out of place."

Page 174. "The common people were not concerned with the Fabian processes, the mediocre reasoning . . . which irritated his colleagues. These unhappy qualities destroyed the admiration, the affection, almost the respect, which the statesmen and politicians who were his closest colleagues, and the companions of his task, once had felt for him."

Page 107. "What distinguished the last fifteen months of Lord Kitchener's life from its earlier period is the vague consciousness in his mind that he was no longer the K. of K. of the Atbara—the age of Cromwell at Naseby—but that the twenty years which had elapsed had bereft him of the vigour which inspired purpose, fixed the determination, and moulded the will of the man who stood on the spot where Gordon fell, and ordered the bones of the Mahdi to be thrown into the Nile."

Other passages to the same effect might easily be collected, but enough has been reproduced to make it plain that, in this comparatively short study, a recurrent thread of almost contemptuous depreciation pervades the whole texture. It is true that the admirers of Lord Kitchener are occasionally indulged, as it were, here with a sop of praise, and there with such a nod of condescending patronage as I imagine Lord Kitchener seldom received in his lifetime, either from Lord Esher or from any one else. But when this

perfunctory tribute has been paid the tone of criticism is resumed with irritating relish. I confess I find myself constantly exasperated by the *de haut en bas* style of the critic. Disparagement is conveyed with indulgent regret, and always with a note, puzzling as well as tiresome, of intellectual superiority. Nor is its belittling effect diminished by the fact that the author's own pages so often supply the antidote. In biography the positive effect of ten pages of favourable narrative is very easily obliterated by a sneer on the eleventh. I.

I shall perhaps be forgiven if, in my own way, I shortly recall those elements in Lord Kitchener's character, intellect, and conduct which place, and will continue to place, him in the forefront of the great figures of the War. Neither he nor any one else is to be protected from criticism, but the adequacy and fairness of the critic may, in their turn, be made the subject of analysis.

Lord Kitchener's life had been lived in the East. It was in the beginning, and it continued to the end to be, a life of unremitting toil. It is quite true that the career had been one of rare distinction. The qualities displayed at Omdurman, Fashoda, Pretoria, and in India were very remarkable. Lord Kitchener plucked personality from his romantic, varied, and laborious career—personality, that mysterious complex of qualities whose citadel is never stormed by industry alone, and without whose gates brilliancy has so often clamoured in vain. Henceforth the man counted as few men in the British Empire. He entered into, and he stayed in, the homes of the people.

I. Without any of the materials open to Ministers he had before the War formed the clear conclusion that Germany intended to challenge an aggressive war (Esher, pp. 14, 15). He had no responsibility for the military weakness which Ministers from 1906 to 1914 judged to be consonant with the state of Europe and the necessities of the times. To each his own burden. His work lay elsewhere.

Then came the challenge, swift, ruthless, mortal; and in a flash, all men realised that the greatest military power, and the second greatest maritime power, in the world was attempting to achieve the conquest of Europe and the destruction of the British Empire. Gone were the soothing dope, the prattle of brotherhood, the cloying treacle of sentiment, with which the Radical and Labour parties had deluged the nation for ten years. Swift the reversion to things elemental . . . beyond speech . . . beyond imagination.

Those who had arranged, and taken part in, reciprocal visits of German editors, German professors, and German members of parliament; those who, year by year, had passed resolutions at the National Liberal Federation in favour of further disarmament; those who had protested at the flying of the national flag above our schoolhouses on Empire Day; and those who had pursued Lord Roberts with malignant or contemptuous hostility, awoke and became aware in a single morning that the foundations of their sloppy folly had rotted beneath them.

It was at this moment that Lord Kitchener was called to the War Office. And here at once

made itself felt the force of that personality of which I have already spoken. It is the literal truth that there was at that moment no man in the British Empire other than Kitchener whose appointment as War Minister would have satisfied the expectations of the Empire. The nation was in courage flaming : in resolve at white heat : and, above all, in revolt against false and sentimental advisers. It asked for nothing but inspiration and direction. The swift and universal recognition that Kitchener alone could give both affords the measure alike of his character and his qualities, as this great and just people conceived of both. I.

He himself was under no delusions. "Whatever be said," he observed to me, " of my colleagues, no one at least can deny them courage. They have no army; and they have declared war against the mightiest military nation in the world."

From the first he was great in his perceptions. He never wavered in his sure and certain conviction that, to use his own conversational phrase, the " punch " of the German attack would be upon, and through, Belgium. The whole authority of the accomplished French Staff was enlisted in behalf of the other view. This circumstance left Kitchener cold and absolutely unmoved. He simply repeated without any attempt at argument, which evidently seemed to him superfluous, that they were wrong. If he had been able to persuade the French in time the British Expeditionary Force would have been set a somewhat different, and a lighter, task.

Lord Esher does full justice to the equal certainty of his conviction as to the duration of

I. the War, and here I can add something. On the day on which he first published the appeal which made his forecast public, I asked him whether he really believed that the War would last so long. He answered that in his opinion it would last longer, but added, "Three years will do to begin with. A nation like Germany after having forced such an issue will only give in when it is beaten to the ground. That will take a very long time. No one living knows how long."

And in this connection it is of interest to notice how short-sighted and ill-informed, in comparison with Kitchener, were the Commander-in-Chief and his Staff of the Expeditionary Force. After the battle of the Marne (in which but for him they would have taken no part) they began to abuse him contemptuously for not sending out to France at once every officer at his disposal for the instruction of the new armies. "The war will be over," wrote one sapient General, "before a single army of K.'s is engaged." And another General, of the highest distinction, whose letter I had myself the good fortune to read, wrote from the Aisne: "Give us five hundred thousand more Englishmen and we will march to Berlin without any French." I told Kitchener of this assurance, which was shown to me by a Minister. He smiled sardonically and continued his vast and lonely preparations.

Lord Esher notes the prescience and coolness which the Secretary of State displayed; but he hardly seems to appreciate what it meant in terms of safety and ultimate victory. If Kitchener had been stampeded by the military advice so freely tendered from France, there never would have

been any new armies at all. The Higher Command would have had at their disposal—and would have well known how to use—some hundreds of thousands of immature and uninstructed soldiers for the trench warfare of 1914–1915, and for the futile and costly offensives which marked the earlier part of the latter year. But for the safety of England there was at the helm *Vir propositi tenax.* To the deranged counsels of military hysteria he paid not the slightest attention. I.

Lord Esher records with reasonable sympathy, and not without admiration, the inspiring part which Kitchener played in the raising of the new armies. And indeed it would be difficult to overstate the comfort afforded by the personality which at that moment—such was our good fortune—out-topped any personality in any belligerent country. Who will ever forget the placard on which those grave and splendid features made a compelling appeal to the chivalrous youth of the British Empire ? The achievement was his and his alone. When he perished his comrades in France might well exclaim, " Si monumentum quaeris circumspice."

The dimensions of the task which Kitchener set himself might have appalled the stoutest heart. No great soldier in the world in 1913 would have admitted the thing to be possible. First came the appeal for volunteers. Next the need of clothing, sheltering, arming, and training them. Soon it became necessary to draft them into formations, and the world realised with incredulity that it was thought possible, while keeping up drafts for the Expeditionary Force,

I. to improvise staffs, artillery, army service corps, and medical equipment for these huge formations. Out of chaos came order: mobs developed into armies; until little by little complete and highly trained instruments were placed at the disposal of those who a year before had derided them as unnecessary, and who were now realising (but never admitting) the futility of their own fatuous predictions.

Nor must it be forgotten that Kitchener addressed himself to these gigantic tasks single-handed. It has sometimes been supposed that he would allow no co-operation; that he preferred to do everything for himself. The case made under this head is greatly exaggerated; but in this matter he had no option. Either he did the work himself or it remained undone. There was no one else. The combatant zeal of the Staff had produced an incredible arrangement under which every officer of high rank shook the dust of the War Office off his feet, and left those in whose hands remained the supreme direction of the World War denuded of all technical advice. The day after the Expeditionary Force sailed, there was actually not an officer of the General Staff of high rank and continuous employment at the War Office capable of working out a Staff plan for Kitchener's consideration.

Side by side with these pre-occupations there pressed upon him, more than upon any individual, the growing anxieties of the military situation in France. The circumstances of his visit to France in uniform during the crisis of the retreat is an instance in point. Lord French thought proper

to resent this visit with great bitterness; and has left on record his supposed grievances upon an incredible page in the book which he has recently published. The account of Lord French; the details collected by Sir George Arthur; the recently published statement of M. Poincaré; and the facts as they are now generally known, have greatly reduced the area of controversy. The plain truth is that Lord French intended in despair to carry the British retreat to a point at which further co-operation with the French armies would have become impossible; that this resolution, which, if carried out, would have excluded us from any share in the Marne, was received with equal dismay by the British Cabinet and by the French; that Lord Kitchener was sent out by the Cabinet to stop it by *any* means which he might judge necessary for that purpose; and that he did stop it. The account given by Lord French of the interview alone with Lord Kitchener, during which, in his recollection, he made the latter see reason, is likely to hold a high place for humour in circumstances which did not, on the whole, lend themselves to mirth. We have not the advantage of Lord Kitchener's account of this interview, but we do know that Lord French abandoned his plan. The incident is recalled here in order to make it plain how various were the anxieties and duties amid which the Secretary of State was working. I.

The reference to the battle of the Marne reminds me of a circumstance which is perhaps worth recalling. He sent for me as soon as the first official account arrived. I made a draft in

I. his presence for publication. He substituted for the more cautious expression I had used the words "the routed enemy." I said, "Is that quite safe?" He replied, "Quite. They are routed in what I think will be the decisive battle of the War." The intuitive quickness and confidence of this judgment made a profound impression upon me at the time, which was to be further deepened by the confirmation which events supplied.

It is no part of my purpose here to examine in detail the various reflections and criticisms which have been passed upon Lord Kitchener in the later stages of his responsibility. He was given the work of about fifty able men to do; but even he could not do more than the work of ten. He laboured all day and far into the night. Hardly a moment passed without calling for a decision: never a day without its burden of anxiety. Although it is clear enough that he made mistakes, many of the criticisms against him are capable of an individual answer; and almost all must give way before a general observation. The general observation depends upon a state of affairs frequently commented upon by Lord Esher himself, and inherent in the character of our Government. Lord Kitchener's work had to be carried on, as is frequently noted, in consultation with many colleagues. It is quite true that, in the early stages, his advice was, within his own province, almost always accepted, and his position, therefore, in purely military matters, almost supreme. But no one even then gave him or any of his colleagues an absolutely free

hand. If Mr. Churchill, for instance, had been Prime Minister, it is as certain as anything in the history of the War can be that he would have won through the Dardanelles. In democratic constitutions, unless and until they are reshaped for warlike purposes, discussion, and the compromise which discussion engenders, is inevitable. Nor would the establishment of a War Cabinet have been possible in the early part of 1915. The necessary experience had not been gained, nor had war personality sufficiently emerged. Even Mr. Lloyd George, in the plenitude of his power, and with all the official strength of his position, could not, try as he might, prevent the costly, futile, and superfluous butchery of Paschendaale. Lord Kitchener often compromised. He often had to compromise. The alternative was resignation, for which there was nothing to be said. It is true that he was not qualified by his previous training to take part in discussion and argument with twenty civilians. Cromwell himself, though no mean controversialist, could not have carried on war with such a burden. But Kitchener did not invent the system. He found it. It took Mr. Lloyd George some time to alter it; and he did not, and could not, do so effectively until he became Prime Minister. Kitchener could not become Prime Minister, and would have made a very bad one; for his ignorance of domestic politics was complete. It is as absurd to blame him for not altering the system, or alternatively for not succeeding with it, as to imagine that, if the existing circumstances had arisen immediately after Omdurman, his comparatively youthful

I.

I. vigour would have discovered some royal road to the desired goal. In fact, alike in sagacity, tact, and all-round experience he was a better man at the later, than at the earlier, period. The constitutional arrangements under which his work was done could only be altered in two ways: first by a military *coup d'État* which no one has, up to the present, suggested: and secondly, by the emergence as Prime Minister of some individual with the daring and self-confidence to covet the office, and the consummate political equipment necessary to gain it first, and keep it afterwards. Such a one Mr. Lloyd George became, but it is as absurd to blame Lord Kitchener for not being Mr. Lloyd George as it would be to blame Mr. Lloyd George for not being Lord Kitchener. *Uno avulso non defecit alter.* In England once again a crisis produced a man; or, to put the matter with greater precision, each crisis produced the man which that crisis required. When the soldier of intuition and genius had completed *his* task there still remained one, not less arduous, for the statesman of intuition and genius. The day of great emotions was over; the day of sophisticated daring succeeded.

When once the limitations under which Lord Kitchener worked are understood, and proper allowance is made for them, much that is difficult to follow becomes plain.

Lord Esher has himself (p. 150) recognised the fundamental truth in a passage which exposes the unsoundness of many of his own conclusions:

"If the conduct of the war had been placed

in his hands, if he had had from the first the help of a trained General Staff Officer of anything like the calibre of Sir Douglas Haig, he might have rivalled his own successes in the Sudan and South Africa; he would have measured and compared the dangers in East and West; and he might have altered the course of the War, and ended it in 1916." I.

This illuminating passage can only mean that it was the system, and the system alone, which paralysed Lord Kitchener's exertions. If it be accepted, Lord Esher's whole thesis peters down to this: not that the Kitchener of 1914 was intellectually unequal to the burdens even of this War, but that the Kitchener of twenty-five years earlier would have been able *in limine* to sweep on one side our whole system of Cabinet Government. Such a hypothesis is of course absurd; and with this necessary admission the whole fabric of Lord Esher's reasoning totters to the ground.

Lord Kitchener had to hold the scales as best he might between a gifted and powerful colleague, who had read, almost alone, the golden secret of the Dardanelles; between a Commander-in-Chief in France, acquisitive of everything for France, whose methods of indicating disagreement were neither decorous, fastidious, nor loyal; between a Minister of subtle intuition who saw, years before they ripened, the remote fruits of Salonica; and between a number of colleagues who thought (quite rightly) that, on the whole, these difficult competitive claims ought to be decided for them by others. And so the Titan laboured on, compromising a claim here; establishing an equipoise

I. there ; encouraging Russia at one moment ; bargaining with France the next ; sailing with feverish haste in his seventh decade now for the Dardanelles, now for Petrograd ; counting nothing done for England while there still remained anything to do. No living soldier could have made a tenth as much out of the actual situation as Kitchener made. That he did not make more was the fault of the system, and the system is inherent in government by democracy, which adapts itself strangely and laboriously to the polity of war. If it be hazarded that perhaps, then, democracy is not a particularly efficient instrument for waging war, it may reasonably be retorted that most of the autocracies of the world tried their hands upon the opposite side, and did not make a particularly good business of it.

I have felt it my duty in the foregoing pages to criticise with freedom much which Lord Esher has written of Lord Kitchener, and to reject absolutely the central theme of his monograph. But I have throughout done full justice to his good faith, and it is therefore with peculiar pleasure that I borrow from his vivid pen the description —entirely accurate and in no way exaggerated— of the last triumph in Lord Kitchener's eventful and chequered life. The effect recorded was an amazing one for a man upon whom disillusionment had already laid a cold hand, and who was pathetically conscious that his prestige, after labours so incredible and achievements so vast, had none the less begun to wane.

" On July 5 the French Ministers and General

Joffre came by special train to Calais, and after certain preliminary conversations the Conference assembled. The memorable sequel was the unexpected effect produced by Lord K. upon its members. His colleagues were astonished; told each other that they had never heard him to such advantage; and commented upon his 'unevenness' in council. The French were much impressed. It was for Lord K. a meteoric moment. He seemed to be freshened up by contact with the French, whose language, of all the English present, he alone spoke tersely and well. He was calm and deliberate without inconsistency in the propositions he brought forward. He put the best construction upon everything that was said, and, while stating in convincing argument the military objections to a premature offensive and the reason for urging a halt until the spring, he appeared to appreciate more clearly than any of his colleagues, and to state more clearly than the French themselves, the political motives indissolubly bound up with the psychology of the French armies and people, which outweighed the purely military argument for delay. On that occasion he proved himself in discussion resourceful, bold, and candid. The French were aware of his wide popularity and power, but they had heard him depreciated. He was personally unknown to them all except M. Millerand, and for the first time French statesmen and soldiers were given a taste of his quality as a man of action; patient in discussion, forceful and intrepid of speech. It was an immense surprise. . . . Looking at Lord Kitchener

I.

I. as an actor on the great stage of the War, the Calais Conference in July 1915 was his supreme hour. Some faculty within him, which had survived his translation from East to West, had vindicated his claim to the confidence of his countrymen. He had stood square against the thunder-blast of a powerful Press, and he had for a time recaptured the lost faith of his most eminent colleagues."

This account is given with generous and just warmth, and for it we forgive Lord Esher much.

We cannot do better than take leave of the great man of whom he writes at this moment of glittering triumph. Not ours to follow him months later into the Northern mists whence, with the loyal and chivalrous Fitzgerald, he voyaged, still for England, upon the last journey of all. Who knows what pictures raced through that driven brain in the dreadful moment of realised doom? Many, I suspect, of the fierce blue skies and scorching deserts of the East; some, perhaps, of Broome and the roses, where never should be pleasaunce for their master; most of all, be sure, of that England which he steadfastly and ardently loved . . . and then the black icy breakers of the Western Orkneys . . . and a great and valiant heart extinguished for ever.

The Trumpet's silver sound is still,
The Warder silent on the Hill.

## II

## SHOULD A DOCTOR TELL?



LORD DAWSON of Penn has placed upon the Order Paper of the House of Lords a motion intended to raise the question of a doctor's obligation to disclose or to keep secret what he has learnt in his professional capacity, when called upon to answer in a Court of Law. The motion has been withdrawn temporarily, but I understand that Lord Dawson will renew it on the first opportunity; and that he will, when the motion comes on, contend that the Courts and the judges should be forbidden by law to require disclosure by the doctor, alike in criminal and in civil causes.

No apology is necessary for raising the question which has been asked by Lord Dawson of Penn. Issues are involved in it which are of the gravest consequence. They deserve the most ample consideration and they must be looked at broadly not as affecting one class or profession or another, but as concerning the whole machinery for the detection and prevention of crime and the administration of justice, and therefore as of the most vital consequence to the community.

In the first place, I would like to clear away,

II. if I can, certain misapprehensions and preconceptions which cloud the discussion of the true issue. The matter is put forward sometimes as a claim for what is called medical privilege—some peculiar right or private advantage to be given to members of the medical profession upon the suggested analogy of some right or privilege possessed by both branches of the legal profession. On that, I would say three things. First, the so-called privilege attaching to the relation of a legal adviser or an advocate is a privilege which is the client's privilege, conferred, not for the benefit of the legal person involved, but for the general advantage of the community, upon the ground that, unless a relation of absolute confidence can be established between the lay client and his professional adviser, in practice the ends of justice cannot be attained. It is worth recollecting that the privilege is denied to the client who consults a lawyer in relation to the furtherance of some criminal enterprise, for in such a case the public interest in detection and punishment of crime demands the fullest disclosure of any *such* confidence.[1]

Many years ago one of my predecessors stated the doctrine in words which have received confirmation both from time and from the opinion of successive judges. "The foundation of the privilege," said Lord Brougham, "is not on account of any particular importance which the law attaches to the business of the legal profession or any particular desire to afford them protection.

[1] See most informative judgmnet in R. *v.* Cox and Railton. 15 Cox Cr. Cases 611.

But it is out of regard to the interests of justice which cannot be upholden and to the administration of justice which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts and in those matters affecting the rights and obligations which form the subject of all judicial proceedings."[1]

Second, that privilege only concerns communications which arise in connection with legal proceedings whether actual or contemplated, or which pass as professional communications in a professional capacity.[2]

And thirdly, it should be observed that though it attaches in some degree to persons who, not being barristers or solicitors, in fact advise lay clients in litigious matters—such persons, for example, as expert witnesses—it is for the most part in its actual operation confined to persons who stand in a peculiar relation to the courts of justice. The solicitor is an officer of the court. Discipline over him, if he abuses his rights or does not discharge his duties properly, rests primarily with his own professional body, all the members of which are also officers of the court; but ultimately rests with the court itself. The discipline of the Bar is in the hands of the Inns of Court; ultimately, again, upon appeal from any Inn, it rests with the judges of England acting collectively.

And the privilege, being created for, and operating in, the administration of justice, is

[1] Per Lord Brougham. Greenough *v.* Gaskell, 1 My. K. 102, 103.

[2] See per Lord Selborne, L.C., in Minet *v.* Morgan. L.R. 8 Ch. App. at p. 368.

II. always under the vigilant eye of His Majesty's judges, themselves trained in the exercise of their profession, but performing their functions as judges, not for the benefit or protection of the Bar or the members of the solicitor's profession, but for the advantage of the litigant and the community at large.

Between this so-called privilege and the claims put forward by, or on behalf of, the medical profession, there is scarcely any analogy. I, therefore, do not pause to describe more exactly the nature of the extent of what is somewhat loosely termed the privilege of the Bar and the solicitor. I would rather invite those who talk and think and write about the matter to consider it upon its merits, having regard to the public good, without reference to the fact (which really has very little to do with it) that for another purpose persons differently situated are placed under peculiar liabilities with regard to secrecy.

There is another professional calling which must naturally occur to men's minds when any allegation of a confidential relation above the law comes into question. It is said that the priest is under an obligation, heavier than any which men can impose, to keep hidden that which has been disclosed to him in confession. It would be unprofitable here to discuss the rule which prevails on this matter in the Roman communion. When this point has arisen in the English Courts, it has been dealt with rather as a matter of discretion in the judge than as a rule of law, though since the case of Rex *v.* Gilham (1 Moo. C.C. 186) it appears to be settled law

that a privilege does not attach to a communication made to a clergyman by way of confession.[1] II.

[1] See per Best C.J. 3 C. and P. at p. 519, and per Alderson B. Cox's Cr. Cases 6219. See note to *Taylor on Evidence*, 10th edition, vol. i. p. 647 :—

"In considering this case (*i.e.* Gilham's case) and other common law decisions upon the subject of evidence, it must be recollected that the common law knew of no distinction between *competent* and *compellable*—such a distinction being entirely the creation of modern statute law. When, therefore, the judges decided (as in 1828, after argument, they all unanimously did in R. *v.* Gilham, 1 Moo. C.C. 186, *absente* Hullock, B.) that a clergyman was *competent* to give evidence of a confession made to him, they in effect also decided that he was *compellable* to do so. It has been argued with much ability in *Best on Evidence*, 8th edit., 1893, §§ 854, 855; Phillimore's *Ecclesiastical Law*, edit. 1873, pp. 701 *et seq.*; and in *The Privilege of Religious Confessions in English Courts of Justice*, by Edward Badeley, M.A. —a convert from Protestantism to the Roman Catholic Church—which was published in London by Butterworths in 1865, that confessions to clergymen of the Established Church are privileged, on the ground that the *articuli cleri* (9 Edw. 2, c. 10), although for centuries treated as obsolete, and at last actually repealed by 'The Statute Law Revision Act, 1863' (26 & 27 V., c. 125), were long the law of the land, and that the opinion (given after the Reformation) expressed in Sir Edward Coke's comment on this statute (2 Inst. 629) may be so read as to imply that such privilege extended to everything but high treason. This view, however, cannot be accepted as being at present the law in the teeth of the decision in R. *v.* Gilham; of the *dicta* of the eminent judges mentioned in note 4 to § 917, in which they tacitly or expressly accept the position that strict law does not admit the privilege, although they protest that they individually will never enforce the strict letter of the law; and of the weight of opinion amongst the writers of text-books on the law of evidence. The present editor has, under these circumstances, advised magistrates that, as they are bound by their oaths to dispense justice to all who seek it of them, without fear, favour, or affection, and as they are also bound to accept without question the law as laid down by the superior courts, they have no alternative but to enforce an answer from a clergyman on a matter relevant to the case before them, and ought not to excuse him on the ground that it is privileged by having been made in confession, and this although they can only punish a witness who refuses to answer by committing him for contempt, and not by merely imposing a fine: The Queen *v.* Flavell, 1884, 14 Q.B.D. 364. The same considerations ought to govern the actions of other inferior courts. It will be noticed that all that the late Sir R. Phillimore ventured to commit himself to was an expression of opinion (Phill. *Eccl. Law*, 704) that it is 'at least not improbable' that the privilege of clergymen of the Church

II. The most explicit statement of the law is to be found in an answer given by the Lord Chancellor (Lord Westbury) in the House of Lords on the 12th May 1865.[1] It was as follows :—

"There can be no doubt that in a suit or criminal proceeding a clergyman of the Church of England is not privileged so as to decline to answer a question which is put to him for the purposes of justice, on the ground that his answer would reveal something that has been made known to him in confession. A witness is compelled to answer every such question, and the law of England does not extend the privilege of refusing to answer to Roman Catholic clergymen who have obtained the information in confession from a person of their own religious persuasion."

The doctrine thus stated was expressly accepted by Lord Chelmsford (ex-Lord Chancellor) upon the same occasion.

It is curious that the canon of 1322 ordains that "no priest through anger, hate, or even fear of death shall dare to disclose in any manner the confession of any one by sign, by nod, or by word generally or specially." But the canon of 1603 provides that "if any man confess his secret and hidden sins to the minister for the unburthening of his conscience and to receive spiritual consolatian and ease of mind of him, we do not in any way bind the said minister by this our constitution, but do straitly charge and admonish him, that he do not at any time reveal and make

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of England as to matters told them in confessions will be recognised when the question next comes before a superior court."

[1] Hansard, 3rd Series, vol. 179 at p. 180.

known to any person whatsoever any crime or offence, so committed to his trust and secrecy (*except they be such crimes as by the laws of this realm his own life may be called into question for concealing the same*) under pain of irregularity." II.

It is perhaps unnecessary to labour the distinction between the position of the doctor and that of the priest, but it is worth while to observe, on the one hand, that the doctrine of the sanctity of the confessional has in the past shaken the stability alike of States and of ecclesiastical systems, and, on the other, that the mysteries confided to the priest are laid before him as definite statements in the course of a sacred and solemn rite as the outpourings of a tortured soul and in the belief that by that means alone can the penitent obtain relief from suffering greater than the law can impose, while the secrets possessed by the doctor are far more usually the fruit of his own skilled observation of the pathological history as it discloses itself before him.

Turning now to the question as it affects doctors, I must first observe that every one will agree in the broad proposition that the relations between a doctor and his patient should be confidential. The only question which arises is as to the limits which should be set to this relation of confidence. In normal circumstances, common sense and the ordinary feelings of honour would prevent a doctor from gossiping about his patient's ailments or symptoms or medical history, and, apart from any question of legal proceedings, the facts must indeed be exceptional which would

II. justify a doctor in divulging that which he knows by reason only of his professional relation. Some may say hastily that if legal proceedings are excluded from consideration the obligation of confidence is absolute. It does not lie upon me to make any definite pronouncement on the subject. No such dictum could be binding, but I will suggest at least one instance where, though no question of any duty before the law complicates the situation, a doctor taking this extreme view may be placed in grave doubt as to his course of action. Take the common case of the general practitioner who has become, through long use and habit, the friend of the household, who has perhaps some twenty years ago brought into the world the daughter who is the hope of the family. Suppose that he is in like relation to another household also, in which a boy of slightly greater age has been his patient for many years. Suppose that in the relation of doctor and patient he becomes aware that the boy is suffering from syphilis and has reached a stage at which his ultimate cure is at least doubtful, while as family friend, the doctor learns that the boy and girl are engaged to be married. What course is he to take ?

It does not rest with me to answer this question. I only propose it for the purpose of suggesting that the whole domain is one where no absolute and inflexible rule can be laid down, where there may easily arise obligations of a conflicting nature, and where the ultimate decision must be taken, in accordance with the high ethical sense of a learned and honourable profession, whose

aim is to raise or at least to maintain the standard of physical health in the community. II.

It is right to point out in this connection that with this very object, that is, the improvement of health in the country, recent statutes have imposed directly upon medical men duties which are inconsistent with any theory of inviolable confidence. The Infectious Disease (Notification) Act, 1889, requires every medical practitioner in attendance upon a patient suffering from an infectious disease to which the Act applies, on becoming aware that the patient is so suffering, immediately to give notice to the medical officer of health for the district by sending to him a certificate stating the name of the patient, the situation of the building, and the name of the infectious disease. The infectious diseases to which the Act applies are small-pox, cholera, diphtheria, membraneous croup, erysipelas, scarlatina or scarlet fever, typhus, typhoid, enteric, relapsing, continued or puerperal fevers.

A still more recent Act—The Notification of Births Act, 1909—requires any person in attendance upon a woman who has given birth to a child within six hours of the birth to give notice in writing of the birth to the medical officer of health.

Failure to comply with the provisions of either of these Acts involves the doctor in a penalty, but his zeal in respect of his duties under the Infectious Disease Act is stimulated by his right to receive from the local authority a fee of 2s. 6d. for every case which he notifies. The policy of the legislature in respect of this matter may be

II. gauged by the fact that the Notification of Births Act, 1909, originally applied only in the areas of those local authorities who adopted it, but by an amending Act of 1915 has been made universal throughout the country.

These two Acts came into existence under the fostering care of the Local Government Board—the predecessor in title of the Ministry of Health. The aim of those who framed and passed them was to check the spread of disease and to improve the public health by affording greater facilities for the care of infant children. They represent the best-informed opinion among those medical practitioners whose interest lies in the promotion of the public health. I cite them for the purpose of showing that where a great public interest is involved, public opinion and the best-informed opinion among doctors is not prepared to tolerate any claim to inviolate secrecy. They are of course patently inconsistent with the whole principle upon which the present agitation rests.

I turn now to consider the field of investigation which lies more immediately before us, where the feelings of the profession and the rule of law may come into conflict. It would be an easier task to reach a definite conclusion here if it were possible to know what exactly is the claim put forward by the spokesmen of the profession, how far that claim is supported unanimously by the great mass of practitioners, whether it is confined to civil matters or relates also to crime, whether it is asserted only where the confidential relation of doctor and patient has been established, whether

it is intended to protect the patient or to further some particular class of ameliorative treatment, or is directed merely or partly to protect the practitioner himself.

The answers to these questions cannot be found in the discussions of the professional bodies representing the medical profession. The arguments used in those discussions and the claims put forward are discordant and loose, and they do not accord with the practice, which is in itself divergent.

Yet it may clarify the consideration of the subject if, in the first place, I set out in the form of an interrogatory the questions which arise and to which distinct answers may be required from the advocates of the claim for professional medical privilege. They are :—

1. Is the claim limited to—
   - (*a*) Civil cases only, or
   - (*b*) Criminal cases only, or
   - (*c*) Does it extend to both classes of cases ?
2. Does the claim extend to matters which are the result of the doctor's observation in the course of his treatment, or is it limited to direct communications made orally or in writing to him by his patient ?
3. As regards crime, is it claimed that—
   - (*a*) Where a doctor has knowledge gained in his professional capacity that a crime is being, or is about to be committed he is not to inform the police ?

II.

(*b*) Where a doctor has knowledge gained in his professional capacity that a crime has been committed, he is not to inform the police ?

4. Where a crime has been committed and the doctor has knowledge gained in his professional capacity which would assist in convicting the criminal or clearing an innocent man (whether his client or not), is it claimed that the doctor is to refuse information to the police when called upon to give it ?
5. Where a crime has been committed and a person has been put upon his trial, and the doctor has knowledge, gained in his professional capacity, which is material to the point at issue, and is called upon on his subpœna to answer questions on matters which he knows in his professional capacity, is it claimed that he is to refuse to answer them ?
6. In any of these cases, is the obligation of silence to be absolute, or is it to depend upon the circumstances of the case, and, if the latter, is the doctor to judge whether he is to reply or not ?
7. Is the obligation of confidence to be violated if the patient wishes it to be ?
8. Is the obligation absolute where the person put upon his trial is not the patient of the doctor and the evidence relates to another person who is, in fact, the doctor's patient ?
9. Towards whom does the obligation exist ?

Where the patient is a husband or wife, does it subsist in respect of the other spouse? Where the patient is a child, does it subsist towards the child or the child's parents, and which, or both, of them? Where the patient is dead, does it still subsist, and if it still subsists towards the surviving relatives, is it releasable by them? Does it subsist in relation to a lunatic who is a patient, and, if so, can it be released by the lunatic's relatives or committee?

10. In civil cases, where the relation of doctor and patient exists between the plaintiff and the doctor, and knowledge obtained by the doctor is necessary or relevant to defeat the plaintiff's claim, and the doctor is subpœnaed to give that evidence on behalf of the defendant, does the obligation exist so as to forbid him to give that evidence?
11. And where the relation exists between the defendant and the doctor, and the doctor is subpœnaed by the plaintiff in order to establish his case, is the doctor then bound to be silent?
12. In particular, in divorce cases, is the doctor, whose knowledge is necessary to establish the commission of a matrimonial offence by either party, to refuse to answer when called by the opposite party, and, if so, does the obligation still hold good where the evidence of the doctor would be material to establish the innocence of the party against whom the charge is made by

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reason of the doctor's knowledge of the pathological condition of the accusing party or otherwise ?

13. In cases where an action is brought by a patient against a medical man between whom and the patient the relation of patient and doctor has been established, and in respect of matters arising out of that relation, is the defendant bound to silence ? Where the relation of doctor and patient subsists between the plaintiff and several medical men simultaneously, and an action is brought by a patient against one of those medical men, are the other medical men bound to silence when called either by the plaintiff or by the defendant ?
14. Where the doctor acts merely as a laboratory pathologist, is the obligation the same as where he acts directly in treatment of disease ? For example, what is the rule to be where the doctor has merely examined specimens taken from the patient's body or clothes ? And is the obligation—whatever it be—the same whether the specimens have been submitted at the instance of the patient himself or at the instance of some third party, such as the police, or the opposite party in a civil action ?
15. What is to be the rule, whether in civil or criminal cases, where the doctor is simultaneously in a position of confidence to two parties, for example, husband and wife, or father and child, and questions arise, whether in a criminal or civil case, between

those parties with respect to which his evidence is material? For example, what is his duty in a case of disputed parentage? In a case of nullity? Or in the case of a charge under the Criminal Law Amendment Act, or under the Prevention of Incest Act?

At the outset of the inquiry it is right first to state the law. Whatever doubt may exist about the privilege of the confessional, none can exist in law about the doctor's claim to privilege. Since the Duchess of Kingston's case [1] it has never seriously been questioned that the law is as it was then stated to be by Lord Mansfield. "If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour and of great indiscretion; but, to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever."

And next it is relevant to cite the view expressed in the most authoritative text-book [2] on the principles and practice of medical jurisprudence—the work, not of a lawyer, but originally of Dr. Taylor, who was in his time undoubtedly the leading English medical jurist, edited in 1910 by Dr. Smith, himself a Fellow of both the Royal Colleges, Lecturer on Medical Jurisprudence at the London Hospital, and Medical Referee for the Home Office.

The work sets out the various points to which

[1] 1776, 20 State Trials, p. 355 and p. 573.

[2] Taylor's *Principles and Practice of Medical Jurisprudence*, 6th edition, 1910.

II. the attention of a medical man must necessarily be directed, and continues (vol. i. p. 5): "It need hardly be observed that questions of this nature are rarely noticed, except in a cursory manner, by professors of chemistry and surgery, and a medical man is not likely to acquire the means of answering them by intuition. On the other hand, regarding ourselves as living in a civilised state, in which the detection and punishment of crime against life and property are indispensable to the security of all, it is impossible to overrate their importance. Unless a witness is able to return answers to these questions when a public necessity occurs, a guilty man may escape punishment, or an innocent man may be condemned. . . . Again, the dead body of an infant is, to a healer of the sick, a corpse, and nothing more; he is too late to be of use; but to the medical jurist it is a human sphinx from which he is expected to extract answers to many questions. Was it mature or immature? Could it have been, and was it, born alive? If so, how long did it live? Was it killed, and if so, how? Or did it die a natural death? If so, why? On the answers to these questions may hang the life of a fellow-creature, or at least the honour of a sister."

Perhaps the most useful method of presenting the matter will be to do so by way of illustration.

The first class of case in which a doctor may be in doubt as to his duty, owing to his consciousness of a divided obligation, on the one hand, to his patient, and, on the other, to the State, arises where, in the course of his practice, he comes upon

circumstances which suggest to his mind that a crime has been committed. It is certainly not his duty to act as a spy or a detective. But there are cases where that which was originally a mere suspicion has hardened, either immediately or in the course of his observation of the patient, into a certainty. The question then is whether he is discharged from his ordinary duty of a citizen. I am not speaking of cases where the mind of the doctor becomes aware before the commission of the crime that a crime is contemplated or is actually in course of execution. In those cases his duty is plain. And as an example of the looseness of thinking and, I must add, the levity with which these matters are sometimes discussed, even by learned and honourable men, I would mention a story which was told, apparently with complacency at a professional assembly.

A doctor, in the course of his attendance upon a sick man, found that the patient's wife, apparently in great distress at the course of his illness, waited upon him hand and foot and nursed him and took care that no food or medicine reached his lips except such as she prepared or administered. The diagnosis was obscure. At length the doctor was forced to the conclusion that the patient was dying of slow poisoning, and that the only hand by which the poison could be administered was that of the wife. He sought counsel from a brother practitioner and he received advice. On the next occasion of his visit to his patient the wife asked him anxiously whether he did not notice some improvement. "No," he replied, "and were it not that I knew

II. that you prepared his food I should have said that your husband was dying of poisoning." The consequences were immediate. The patient began to mend, and in the course of a week, when he had begun to regain his strength, the wife left the house with another man.

This was actually applauded as an instance of the tact whereby professional secrecy may be maintained and its evil consequences averted. As a guide to the aspiring student I can conceive no more dangerous precedent. Consider the facts and the looseness of the reasoning employed. If any relation of confidence existed, it was between the doctor and the poisoned man. On no construction could it be maintained that the practitioner had any duty to the guilty wife. Yet he assumes that his tongue is tied, that he must impale himself upon the horns of a dilemma, and must either see a murder contrived and committed under his eyes or take such steps as would ensure the escape of the would-be murderess. Suppose that she had not acted upon the hint; suppose that she desisted for the time and resumed her work at a later date with another doctor or with no doctor in attendance. This is not the class of case which I have in mind as presenting any doubt to a reasonable man.

But I must add this. Cases of murder by poisoning are more frequent than is commonly imagined. In many such cases some doctor has had some chance of observing something to put him on his guard. In every such case it is on the doctor's evidence that the strength of the prosecution must depend.

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Contrast with the curious doctrine which I have set out above that stated by Dr. Taylor and his editors. "Here one must always remember that a doctor is or should be the confidential friend of his patients, at least so far as professional matters are concerned, and police and detective work form no proper part of his ordinary duties. One would say, therefore, exhaust the diplomatic methods before resorting to the police. . . . On the other hand, such cases usually are crimes of the very deepest dye, and in bringing such to the notice of the police there is no need to consider the feelings of the scoundrels who would perpetrate such horrors. . . . When a practitioner is aware of a case of poisoning it is necessary that he should know to what points he ought to give his attention. Every effort should be made by him to save life when the individual is living; but while engaged on one duty it is also in his power to perform another, supposing the case to be one of *suspected* criminal poisoning, namely, to note down many circumstances which may tend to detect the perpetrator of a crime. There is no person so well fitted to observe these points as a medical man, but it unfortunately happens that many facts, important as evidence, are often overlooked. . . . A medical man need not make himself officious on such occasions, but he would be unmindful of his duty as a member of society if he did not aid the cause of justice by extending his scientific knowledge to the detection of crime."

This is the true doctrine and the old doctrine, and the idea that the professional relation justifies

II. the doctor in refusing his aid to the execution of the law is as novel as it is extravagant.

I would come next to a case or a series of cases which depend, not on the anecdotal reminiscences of professional geniality, but upon the records of the police.

Last year an East End doctor was put on his trial for murder. The circumstances were particularly atrocious. While he was in the act of performing the operation of abortion upon a woman she collapsed and died, and her body was found in an entry not far from the surgery, whence it had been conveyed under cover of night by the doctor. The jury took a merciful view of his case, and he was, in fact, convicted of manslaughter; but the interest of the case for the present purpose lies in the discoveries made in his house by the police during the course of their enquiry. The doctor, whatever his skill as a surgeon may have been, possessed an orderly mind, and kept a record, signed in each case by the patient, of those upon whom he had performed a similar operation, and the documents disclosed evidence of some 400 cases of abortion performed by him.

It is obvious to any one who has any experience of what usually happens in cases of this kind that very many of the women concerned must have come under the observation of other medical men in the course of their convalescence, and the condition of those women and the means whereby it had been procured must have become apparent to them. Between those women and those doctors there no doubt existed the relation of

doctor and patient, and, relying as they must have done upon this relation, not one of those doctors gave such assistance to the police as would have enabled them to take proceedings. This open shop for the performance of felony and murder might still have been in active operation but for the accident of this poor woman's death. When one thinks calmly of the many other deaths which must have ensued as a consequence of the operations upon the 400 women concerned, when one thinks of the ruined health and shattered lives which could be traced, if we knew all the facts, to that one small East End surgery, one becomes impatient of a claim set up by a medical practitioner that he is entitled, under a plea of privilege, to neglect the obvious duty of a citizen and to abstain from giving to the proper authority information which would have saved many a life and put an end to a social pest. This is not an isolated case.

In June 1916 a single woman, whom I will call X, was in the employment of Dr. A. She became unwell. Dr. A called in Dr. B, who suggested her removal to a hospital, but she declined this and went away with a friend to the latter's house. The friend called in a third doctor, C, but she wished her own doctor, D, to be employed, and he was fetched. D sent her to a nursing home, where she told the principal that she had used an instrument herself to procure abortion. D for some reason turned the case over to a fifth doctor, E, who attended her till her death, before which a sixth doctor, F, was called in to operate. The post-mortem

II. revealed the fact that she had been operated upon for abortion by a skilled person, and a verdict of murder against some person unknown was returned at the inquest. Until after the death, no communication was made to the police by any of these doctors, some of whom must have known and others of whom must have suspected what had happened, and as a result the culprit was not discovered.

I will give yet another case. In February 1918 a married woman had a miscarriage and a doctor was called in. A specialist was also called and she was taken to a nursing home. At a subsequent date, the two doctors found it necessary to operate upon her in the presence of a third doctor, an anæsthetist.

The doctors were apparently convinced that an illegal operation had been performed. The anæsthetist questioned her, and she made a statement that an operation had been performed on her by a man, whose name she gave. The anæsthetist questioned the man, who denied it.

She subsequently died, and the post-mortem disclosed that she had been originally operated upon by a skilled person.

No information was given to the police until after the death. The statement to the anæsthetist was useless as evidence, as it was not in the form of a dying declaration. The coroner's jury returned a verdict of murder against the man named, but in the absence of any evidence, except the statement of the woman, which could not be put in, the Attorney-General was forced to enter a *nolle prosequi*.

I have before me particulars of numerous other cases, which in their turn are only samples from many which are in the experience of the police. In all these cases the doctor may plead that in respecting his client's confidence he was obeying his professional etiquette. Such a plea is frivolous. The result has been in each case that a criminal has escaped from prosecution and in all probability that a person who makes a trade of crime has been enabled to continue his or her operations. It must also be recollected that the woman in this class of case is equally a criminal—she is generally the instigator of the crime. The attitude of doctors in some of these cases almost makes one regret that the offence of "misprision of felony" has been allowed to become obsolete.

But in all these cases the doctor found himself finally obliged either to tender information to the police or to give information when called upon. There must be many cases where, whether death has resulted or not, the crime has remained undetected. These illustrations relate to cases in which criminal abortions have been procured or attempted—a class of crime which is rife in various parts of the country and amongst many classes, and very largely resorted to by married women. Probably in all but a very few, a medical man is consulted at some stage or another. These crimes, which are not only dangerous to the woman but highly mischievous to the community at the present time, might well be materially reduced in number if medical men considered their duty as citizens at least as

II. highly as their supposed duty of keeping secret their patients' misdeeds.

I pass to another class of case arising under the criminal law where the relation of doctor and patient has never been established and where the claim made by the practitioner is indeed amazing. This class of case is of especial interest because it arises in connection with the clinics for venereal disease, in relation to which the present controversy has become acute. I shall have something to say at a later stage on the subject of the necessity for secrecy with regard to patients who visit these clinics, and with regard to the necessary and important work which they perform. The case, however, which I am about to mention cannot seriously be put forward as covered by the need for secrecy, and, as I have already said, no plea for secrecy can be urged by reason of the professional relation.

A doctor in attendance at one of these clinics sent to a laboratory a sample of blood for the purpose of its examination under the Wassermann test. All that is known by the laboratory staff with reference to the specimen is that it comes from a male person of a stated age and that the report is required in connection with legal proceedings. At a subsequent date another specimen taken from a female child is sent to the same laboratory for a similar purpose.

In both cases the result of the test conducted by the doctor at the laboratory is positive, that is to say, it indicates that both the persons from whom the specimens were taken were suffering

from syphilis. The doctor from the clinic, making no claim for privilege, appears to give evidence at the police court, upon a charge against the male of the most revolting character. The laboratory assistant, a medical man, attends the police court and protests against being called upon to give evidence, and the laboratory staff contend that the test should not be used against the accused without his consent and that the laboratory staff ought not to give evidence without his consent. Such a claim is preposterous. Here we have the police authorities, in proper execution of their duty, seeking to put into force a statute, intended to protect women and children of tender age from outrage. Every one knows how difficult of proof these cases are. What kind of confidential relation has been set up between this elderly syphilitic violator of his own child and the laboratory staff to whom he is only known through the specimen of a sample of his blood? What possibility is there of procuring evidence, which must in any circumstances be difficult to procure and irksome to give, if the members of the medical profession refuse their assistance to the police in matters of this kind?

The next case presents still more curious features.

On the 13th May 1918, a child, whom I will call X, was taken to a London hospital by her mother and was there examined. Though no statement has ever been obtained from the hospital, the examination must have disclosed what was in fact the case; that is, that she had been violated in circumstances of peculiar

II. atrocity and that syphilis had been communicated to her.

As a result of attendance at this hospital as an out-patient, she was on the 17th May sent to the Lock hospital, of which she became an inmate.

If information had been given immediately to the police by the authorities at the first hospital, it is possible that the man might have been apprehended immediately. As it was, he absconded.

The police, however, to whom complaint had been made by the mother, proceeded with their inquiry, and on the 20th May sent a detective-inspector to the Lock hospital to ask the doctor whether he would give a statement as to the condition of the child. The doctor stated orally that the child was suffering from syphilis, but refused to give a written statement without the authority of the secretary to the hospital.

On the 21st May a woman in the employment of the police called at the hospital by appointment to take a statement from the child. On her arrival she was refused permission to see the child without written authority from the mother. The statement made by this lady of the various obstructions she encountered on this occasion is of some interest, but is too long for insertion here. Written authority was obtained, and the statement was taken on the 23rd May.

On the same day, the assistant commissioner in charge of the case wrote to the secretary asking whether the doctor who attended the patient might be allowed to give a statement as to her condition. This also was refused by

a letter dated the 7th June. On the 19th June the assistant commissioner repeated his request or asked in the alternative that the divisional surgeon might be allowed to examine the child. II.

An answer was received on the 21st giving permission for the divisional surgeon to examine the child provided another written authority was received from the mother. This also was obtained, and on the 26th June the divisional surgeon examined and reported upon her. Meanwhile, the man had returned to London and was apprehended on the 24th June. It is difficult to understand whether these refusals were put upon the ground of privilege. If so, the situation and the nature of the privilege deserve consideration. The child is 10 years old. She has been taken to a Lock hospital. If any prejudice is likely to accrue to her by reason of the outrage which she has suffered, it has accrued already. The whole proceedings were started upon a complaint made by her mother. I must state plainly that there is no use in strengthening the law for the protection of women and children from outrages of this kind if, when the police begin to investigate such a charge—and the charge in this case was of an unusual degree of gravity—they are delayed for five weeks before any statement can be obtained upon which an information can be laid.

The matter, however, does not rest there. The venereal disease clinics are performing work of great importance to the national health. No one would desire to hinder them; no one would desire to do anything but assist them in the

II. purpose which they and their designers have in view. By reason, however, of the success which they are already achieving they either have in attendance at them, or have at their command as pathologists in laboratories which are not directly under their control, almost a monopoly of those scientific men who have a knowledge of the diseases in question and are competent to conduct the technical tests which modern science has discovered. It is to those doctors, whether serving in the clinics themselves or in the laboratories, that any one who wishes to obtain information on these subjects must necessarily apply. People who have experience of assize courts and courts of quarter sessions (either as lawyers or as connected with societies for the protection of women or children) know the difficulty in which the prosecution is always placed when the person upon whom the outrage has been committed is a child of tender years. In too many of these cases corroborative evidence of what the child has suffered is to be found in the condition of the child's body and an examination of her blood. The only chance of a conviction rests in satisfactory evidence on these matters being placed before the court, and it is, as I have said, from these doctors alone that that evidence can be obtained. It is surely monstrous that, when that evidence is sought, some fancied obligation towards the actual victim of the crime is to be set up as a bar to making the statement. And be it observed that the difficulty is not resolved merely because the doctor, when called upon his subpœna, in fact, appears, however reluctantly,

and gives his evidence to the court. It is essential that that evidence should have been given in a form of statement to the Crown when the original question of whether proceedings should be taken at all was under the consideration of the Crown's advisers. On the other hand, this early information may well be of the greatest advantage to some person wrongly suspected of having criminally communicated the disease to the child, by entirely removing at an early stage in the inquiry any ground of suspicion. II.

The next example to which I draw attention raises the question in a slightly different form. The Public Prosecutor, dealing with a case which arose in an English country district relating to a child between five and six years of age, found it necessary to communicate with the medical superintendent of a hospital for venereal diseases, at which the man suspected of the offence had presented himself for treatment. The medical superintendent acknowledged the letter and gave no information. He was subsequently called upon proceedings before the magistrates. He thereupon objected to be sworn on the ground that he could not be called upon to disclose the confidence of his patient. The gentleman representing the Crown insisted that the doctor was bound to take the oath and answer all questions, and he was accordingly sworn and gave evidence, but when he was asked the result of his examination of the accused man, he said that he claimed privilege as his medical adviser and on the ground that all persons suffering from venereal diseases had been invited to submit themselves for treat-

II. ment and had been promised secrecy. The magistrates overruled the claim for privilege, and the doctor then gave the result of his observation in the prisoner's case.

It will be observed that in this case the plea of a professional relation between a doctor at a venereal clinic and a man who there presents himself for treatment is put forward fairly and squarely as a ground on which the doctor's duty as a citizen to assist the court in arriving at the truth is to be abrogated. The quarrel here, if there be a quarrel, is not between the law, on the one hand, and the medical profession, on the other. It is between those who claim this privilege, and the parents of little children whose protection is the primary aim of the law. I will not labour the point. I believe it is enough to state the facts and leave them to the judgment of those whose special interest is the protection of women and children, and, lastly, to that of every father and every mother in the country.

It may be that a knowledge that a criminal suffering from these diseases cannot hope that the fact that he suffers from them will remain undisclosed, if his crime comes to be investigated, may deter persons so suffering from presenting themselves for treatment, and I fully admit that anything which tends so to deter is in itself an evil. Is it so great an evil, is it likely to prove so great a deterrent that we are on that account alone to break into the whole structure of our system of criminal jurisprudence? The extent of the ravages of this disease is very great. Fortunately, a very small proportion indeed of

those who suffer from it have any reason to apprehend any criminal proceedings against them. There is not the least reason why those who, however indiscreet or unfortunate their conduct may have been, are innocent of any offence against the criminal law should be deterred from seeking the treatment which they know can alone relieve them from great suffering merely by the knowledge that criminals who seek the same advantages do so at their peril.

I have dealt at such length and with such particularity with cases arising in connection with the criminal law, not because I think that there could be any reasonable doubt upon the subject, but so that all may be made fully aware of the situation and, as far as it is possible in matters of this kind, so that we may hear no more of claims in this regard and, if I may say so, so that the obstruction of which I have spoken may cease. That obstruction is, I am sure, based not upon the unwillingness of the medical profession to do their duty, but upon the fact that it has not been brought home to them by illustration and argument how important is the aid which they can give to the detection of crime and the administration of justice.

I pass to the more debatable ground of civil proceedings. Here the case put forward is more plausible and, therefore, possibly more dangerous.

Let me, in the first place, point out what it is which is claimed. It is that there should be established in this country a class possessing a privilege outside the law, such as is conferred on no other citizen and no other profession. The

II. privilege claimed, for the reasons which I have already given, presents no analogy to that of the barrister or solicitor, except when it arises in circumstances which will protect a communication to a medical man equally with that made to a barrister or a solicitor, that is to say, when it is made in contemplation or in the course of litigation. But as regards other communications, what case has been made out for this establishment of a privileged class and this inroad upon the law? It has been said that the cases in which such a privilege could be invoked are few. No doubt this is true, but this very fact is in itself an argument against the concession. The law is administered under the control of judges of experience, each one of whom must himself at some time or another in his life have been the patient of some doctor. They are not men whose minds are biassed against the medical profession nor men who would wantonly outrage the canons of decent feeling. They may be relied upon to compel an answer only in circumstances which imperatively demand that an answer should be given. There is no question here of any liability upon the profession to make any statement in advance or to give a proof to either side. The only question is whether, when the doctor, appearing on his subpœna, is asked a question, and it is proper in the view of the judge that he should answer it, he or the judge is to decide that question.

I have already called attention to the fact that it cannot be said that the confidence is always to be inviolable. Cases must arise where, apart

from any legal proceedings, a doctor, between two divided duties, must himself decide to neglect the one in obedience to the superior claim of the other. And this is apparent from the fact that, when at the meeting of the British Medical Association in 1920 the very illustration with which I commenced this memorandum was put to the assembly, there were divergent cries of "Yes" and "No" from the experienced practitioners there collected. It is not without interest to notice in what spirit the claim which we are now discussing is sometimes put forward. Only the other day a medical officer of a venereal clinic refused to disclose the confidence reposed in him by his patient, although his patient, desirous so far as he could to repair the injury which he had done to his wife, himself asked the doctor to give evidence as to his condition. "It appears to me that it is a misuse of the services of the medical officers of this clinic to compel them to come up to furnish evidence for divorce, as in this case where the man made use of his attendance at the clinic as a proof of his adultery." So the doctor wrote on this particular occasion — surely an amazing view of the duties of a citizen called to testify before the law courts of his country upon an issue of grave importance both to man and wife. II.

It is unnecessary for me to combat seriously such a claim as this. What we have to look at is the case where a doctor is called as a witness in civil proceedings and is asked to give evidence against his patient's will of the symptoms which he has observed in him. Let me suggest an

II. illustration of the circumstances in which this might occur. A. B. files his petition for divorce, alleging adultery on the part of his wife with a man unknown, and supports his plea by the allegation that she has acquired syphilis and communicated it to him. The wife admits that she is infected, but she replies that her husband was the origin of the infection. The facts on which the reputation of these two parties depends are known to the doctor and him alone. Let us assume, for the sake of argument, that the husband's story is true. Is he to be precluded from clearing himself from so infamous an allegation and be denied that relief to which, upon proof of the facts, he is justly entitled? Let us assume, on the other hand, that the wife's story is true. Is she to continue under the burden of this charge when she can be cleared perhaps by a simple sentence from the doctor? This is merely an illustration, though one calculated to strike the imagination, of the kind of difficulty which would arise were the claim admitted in civil cases. It is necessary, to arrive at a conclusion, to consider in analysis in what other classes of cases the doctor's evidence may be essential to the elucidation of the truth.

The first and most obvious is the action for what is called in somewhat barbarous jargon malpraxis, that is, improper or negligent treatment of the patient by the doctor. It is too clear for argument that if the patient brings his action on this ground against the doctor attending him, the mouth of the latter must be opened in self-defence. Is it not equally clear that any other

doctor who has been in attendance upon the case must be both a competent and a compellable witness on either side? It may be alleged in such an action that the operating surgeon has wrongfully performed an unnecessary operation, and thereby, it may be, inflicted some harm upon or some permanent impairment of the body of the patient. Is he not to be entitled to call in his defence the general practitioner in attendance upon the patient to testify perhaps to the patient's condition before the operation was conducted? Cases are not infrequent in which it is alleged that the patient, having been put under anæsthesia for one purpose, has been made the victim of an operation for another purpose. The truth can only be arrived at by the statements of the other medical men present.

Again, it not infrequently happens that insurance companies defend actions upon policies of life insurance, alleging that material questions in the form of proposal have been answered incorrectly, and that they have been induced to enter into a contract of insurance by the statement that the proposer has not suffered from some named disease. On such questions the medical practitioner in ordinary attendance upon the deceased is a material, perhaps the only material, witness on either side. It cannot be that he is to be excluded from giving evidence altogether. Still less would it be consonant with the ordinary doctrines of fair play which distinguish our jurisprudence if he were to be a competent and compellable witness for the plaintiff but not for the defendant. Be it

II. observed that the relation of confidence in this case is not released, if it ever existed, by the death of the patient. Upon the extreme medical theory it never can be released, but it would be intolerable that it should only be defeasible upon the motion of one party to the litigation and not of the other.

Next comes the class of case in which paternity is in question. In these actions not only may the reputation of parties depend upon a right decision, but there may be involved the title to dignities or to great estates and large sums of money. The Duchess of Kingston's case was of this class. It was in form a criminal trial at the Bar of the House of Lords upon an accusation of bigamy. The defendant was the famous Miss Chudleigh, who, even if her subsequent matrimonial adventures had not earned her a memorial in English jurisprudence, would be well known by reason of her frequent appearance in Horace Walpole's letters. The question was whether that lady, who had gone through a form of marriage with the Duke of Kingston, had been previously married to Mr. Hervey (at the time of the trial Lord Bristol), and whether she had borne a child to him. Mr. Hawkins's evidence, to which allusion has already been made, was directed to proving the birth of the child. No title or estates or legitimacy were, in fact, at stake, for the child died shortly after birth. But it is obvious that, if the child had lived, a question might have arisen such as that in the famous Douglas Cause or in the great Annesley trial, and it would have been almost impossible to prove

the birth of the child except through the testimony of Mr. Hawkins. It would be a strange anomaly if in those circumstances when the evidence of the doctor was to be available upon the criminal charge it was not to be available in civil proceedings arising out of the same events. II.

Similar questions have arisen in more recent cases. Probably the Slingsby case will be within the recollection of every one. The doctor's position in that case was peculiar, and it illustrates not only how essential it is to the ends of justice that the medical testimony should be available both for civil and for criminal proceedings, but also how complex a situation would arise if the plea of confidence were to be established. In that case, according to the evidence of Mrs. Slingsby, the doctor who attended her in her confinement was the best witness who could be called to prove that she had in fact borne a child. The doctor, however, was called as a witness hostile to the claim of the infant petitioner. His story was that he had attended in her confinement a single woman named Lillian Anderson, and that he had subsequently been instrumental in handing the child to Mrs. Slingsby and in procuring the making of false entries and false certificates to cover what he had done, and to establish that the child was Mrs. Slingsby's. According to Mrs. Slingsby's story, the doctor had assisted her in her alleged delivery of a child. He was, on this assumption, in a relation of confidence to her, and, upon the medical theory, he could only have been called, if at all, with her leave. According to his statement, he was in no confidential

II. relation to Mrs. Slingsby, except that confidential relation which arises between persons who conspire to commit a fraud. But he was, on his own statement, in a confidential relation to Lillian Anderson, and, without that confidence being broken, it would have been extremely difficult to defeat the claim, which the Courts have held to be fraudulent, or, if any criminal proceedings had followed, to present to the Court the case against the parties to the alleged fraud. On the other hand, if proceedings had been taken against the persons who were alleged to have devised the fraud and they had in fact been innocent, the gravest injustice would have followed if they had been unable to call the doctor merely because he was in a confidential relation to a third party.

When these and similar cases are considered, a further question arises. Communications are made in maternity cases to other persons besides the doctor, who stand in a relation of qualified confidence towards the patient. The nurse as well as the doctor is admitted to an intimacy of knowledge which is inconsistent with any revelation by her of what she has heard or seen except under the compulsion of the law. Are the communications to, and the observations made by, the doctor to be alone privileged or is this to be extended to the nurse ? There are thousands of cases every year in which in a confinement the only person in attendance is a midwife. Is her evidence to be available while that of the doctor, if he chances to be present, is to be excluded ?

Again, the doctor has no monopoly of medical practice. He is by law the only person entitled

to sue for fees in respect of attendance as a physician. But any one may attend a sick person. There are sects which deliberately reject medical aid and prefer to rely upon spiritual assistance, employing for that purpose persons who, as they believe, have a special skill in spiritual, though not in medical, matters. There are other large classes of the population who have recourse to herbalists; others take the advice of chemists on certain matters, and others resort to persons of skill in dealing with particular ailments as, for example, bone setters, who have no medical qualification.

The chemist, moreover, even where he acts solely as the compounder or seller of the medicine prescribed by the doctor, is, constructively at least, the recipient of confidence. He is a responsible professional man, admitted by examination to a class which has a strong professional feeling and a high code of ethics. The patient must rely on his technical skill and on his discretion. The ingredients named in the prescription may, and often do, indicate to him facts as to the patient's condition which may be material in civil or in criminal cases. What is to be his position?

Are the Christian scientist healer, the herbalist, the quack, the bone setter, the chemist, to be covered by the same doctrine as the doctor? If not, on what logical theory is the distinction to be based?

The matter does not rest there. The complexities of life in a civilised community such as our own produce a web of confidential relations

II. and confidential communications round every citizen. The universal system of banking in this country puts almost every one into a relation to his banker which is intended to be confidential and is respected as such by the banker. And apart from the confidence which every customer expects of a banker in the keeping of his private account, there come to many people times when a full disclosure to the banker of their financial state is essential and can in practice only be made upon a footing of confidence. Is it to be said that when either criminal or civil proceedings arise that confidence is to remain absolute? The whole policy of our law with relation to bankruptcy makes it clear that in these commercial relations a time comes when, for the safety of the total trading community, the obligation of confidence must give way before a more overwhelming necessity.

What, then, about the confidential relation between a master and his clerks, between two partners, between principal and agent? In all these cases there is rightly a confidential relation, and in none of these cases would it be contended that the secrecy must not be broken when the law commands.

Lastly, on this head there is the most intimate relation of all—that between a man and his wife. The law on this subject is intricate, and it has only reached its present condition through a series of stages. By the common law of England persons interested in the result of a civil or criminal trial, either as a party or as the husband or wife of the party, were incompetent

to give evidence at the trial. This, so far as the incompetence depended upon the marriage tie, was based not so much upon the idea of confidence as upon the theory that husbands or wives were more likely to commit perjury than to tell the truth to the disadvantage of their respective spouses. So far as civil causes are concerned, this state of affairs was finally brought to an end by the Evidence Amendment Act, 1853, under which in any action or arbitration husbands and wives of the parties to the proceeding were made competent and compellable witnesses, subject, however, to the provision that no husband is compellable to disclose any communication made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage. This qualification "rests on the obvious ground that the admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence, which is the most endearing solace of married life."[1] It is worthy of note that it extends to communications only. Those matters which the husband or the wife has observed in the conduct of the other must, if material, be disclosed.

In criminal matters, the law, after many alterations, is embodied in the Criminal Evidence Act, 1898, which enacts that every person charged with an offence and the wife or husband, as the case may be, of the person so charged shall be

[1] *Taylor on Evidence*, 10th edit., vol. i. p. 642.

II. a competent witness for the defence at every stage of the proceeding, whether the person so charged is charged solely or jointly with any other person. The Act contains certain safeguards. The wife or husband of a person charged is not to be called except upon the application of the prisoner and, as in civil proceedings, the husband is not compellable to disclose any communication made to him by his wife during the marriage, or the wife compellable to disclose any communication made to her by her husband during the marriage. Further, under certain other statutes the wife or husband is a compellable witness, either for the prosecution or the defence, without the consent of the person charged. These statutes are: The Vagrancy Act, The Offences Against the Person Act, The Married Women's Property Act, Criminal Law Amendment Act, Prevention of Cruelty to Children Act, and The Incest Act. The history of this legislation illustrates once again the policy of the law, which is in itself the fruit of the experience of the courts. One by one, barriers which the caution of our predecessors erected have been removed so that there may be open, whether to the plaintiff or defendant, whether to the Crown or the prisoner, every possible means of elucidating the truth consonant with the fundamental structure of the society in which we live.

It is clear that no general statutory prohibition against disclosure by the doctor in the witness box is consistent with the administration of justice. Civil suits are sometimes thought to

be of less importance to the community than the execution of criminal justice. But, on the orderly determination of the issues which arise in civil proceedings, not only may there depend the happiness of the parties immediately concerned, but, rightly considered, the authority of the State itself dealing out that impartial justice between man and man and man and woman which is essential to the well-being of the modern community. The whole tendency of our law for many years has been in the direction of opening the mouths of those who can assist the course of justice and not of closing them; in reducing those classes whose testimony, for whatever reason, cannot be accepted in a court of law rather than in increasing them, and in this, as in other matters, breaking down barriers of privilege for each of which perhaps before it fell a sturdy argument might be adduced. The obligation of silence with regard to professional communications to lawyers has, on the other hand, of late years become more extensive. It has, in fact, grown, as circumstances required, under the hand of the judiciary, who can be trusted to curb any abuse of it. But it is not such a privilege as is now claimed. Now, to establish a class who may at their will assist or obstruct the judges in their work would be a retrograde step not justified by any argument which has been brought forward. These are the opinions not only of myself, speaking with all the responsibility which accrues to me as Lord Chancellor, but of most men of experience in every branch of the law. I have no doubt that

II. that opinion is shared by the great majority—perhaps by all—of the judges of the High Court. It is shared by those most fitted to give an opinion at the Bar. I am convinced that it is consonant with the whole scheme of our judicial history, and that it rests upon a solid basis of equity and of common sense.

## III

## THE OXFORD UNION SOCIETY



ANY one who attempts to sketch the history of the Oxford Union Society in however brief a form must feel that in a certain sense he is beating the air. The life of the Society has consisted in the tradition which it has set up and which it still continues. But all this is a matter of flesh and blood rather than of a cold tradition to be recorded by history. The feeling of mutual friendship or even of mutual enmity among the officers and members of the Society—the interchange of free debate—the first vague groping of youth towards power—the gradual building up of a tendency towards a certain form of verbal expression—all these are things which may easily be felt by a Corporate Community but are not easily translated from life to paper. The ghosts of the ex-Presidents pass one another in a long file, each with a jest or a gibe or a smile of the old character ready for any man who has the assurance to attempt a description of the body which they once led. I am not nervous by temperament, but I must confess a certain fear of these ghosts of the past, and of these questioning voices which ask me to define what the Oxford Union means and what its succession of Presi-

III. dents, officers, speakers, auditors, and members of that Society stand for in history. The tradition is permanent, but the actual figures loom impalpable like men moving in a fog. The individualities seem lost in the current like particles of water in a stream.

The origin of the Union Society is wrapped in mystery. The United Debating Society existed in 1823, and if the parentage of the present Union can be traced back to a body which dissolved and was reconstituted as the real Oxford Union Society in 1825, we ought to be able to celebrate our centenary less than two years from now. The Cambridge Union Society has just indulged in this celebration, but what we yield to Cambridge in years we modestly reclaim in relative eminence. The rôle of British statesman owes on the whole, I think, more to the lists of the Presidents of the Oxford Union than it does to the heads of the sister Society at Cambridge. Some considerable support is lent to this claim by the Cabinet lists of the Great War.

The more austere critics will say that we have no right to celebrate till December 5, 1825, when one Donald Maclean of Christ Church called the first undoubted meeting "in one of the low-browed rooms" of that ancient house of learning.

The Proctors disliked the institution and began by refusing leave for the hire of a public room for debate—apparently on the grounds that all public discussion must of necessity be revolutionary. The Union Society, they thought, must go out at once and burn the Duke of Wellington in effigy or put the nearest College Dean on a bonfire.

These doubts were soon removed by the decorum which the Society early began to practise. In fact it would be far more probable to find members of the House of Lords or Commons engaged in a revolutionary conspiracy, or rioting on Lambeth Bridge, than to discover any impropriety in the conduct of the members of the Oxford Union Society.

But the real origin of the Union lies deep in the nature of the undergraduates of the period of 1820, and is an expression of the temper of that time. The attitude of a blank repression, due to the necessity of preserving an united opposition to Napoleon, had passed away. The need for discussion was felt on all hands. Men began to meet in small bodies to drink wine together, and to discuss public questions. And how, in a democratic country, could men be more agreeably or usefully occupied?

Sir Robert Peel belonged to this period and his immediate successor was Mr. Gladstone, the eponymous hero of the Union. These small gatherings formed themselves between 1820 and 1830 into clubs. One side of the movement developed the idea of the semi-private wine party and limited its numbers. It relied for its prestige on this very limitation. A social exclusiveness enhanced a political value. Of this type are the Canning, the Chatham, the Palmerston, and the Russell. All these clubs have exercised a marked influence on the Union Society and have at one time or another supplied the greater body with a succession of Presidents.

But the unknown founders of the Union had

III. a different ambition. They desired to let everybody in. Numbers, not selection, was their ambition. They were the first democrats and the founders of the first society to open the career to talent. Anybody who could talk, and would bring down friends to talk, or to back him was welcome. The Anti-Reformers in 1832, headed by Mr. Gladstone and Lord Lincoln, brought down relays of speakers and supporters to confound the opposition.

If I had to write a sentence over the doors of the Debating Hall, it would be "Let them all come." As a matter of fact they did come, and in continuously increasing numbers. Here at last was the career open to the ambitious undergraduate.

I remember my own time at Oxford very well. I worked (when they came too close) for my schools; I was not neglectful of football; and in various ways I was careful to keep myself amused; but I felt in the Union one of the greatest interests of my undergraduate life. Here was a contest which depended on nothing but the merit of the competitors. And the prize was worth having—both then and in the future.

The Presidency of the Union confers great prestige and also considerable powers. It is, of course, not on the whole comparable with that of the O.U.B.C. Only once have the two offices been united—in the person of Lord Ampthill. The combination must have represented the nearest approach to apotheosis of which our degenerate age is capable—though I think that Sir A. D. Steel-Maitland, M.P., rowed in the Oxford boat while

he was President. I never could interest Mr. C. B. Fry, who was my friend and contemporary at Wadham, in the Union Society. This grieved me, because he was by far the most important person of his day at Oxford. Even Heads of Houses and Vice-Chancellors used to bow to him in the street. III.

But the Union was one avenue by which a man could carve his road to success. I should be the last person to underrate the value of success in the schools. A man who can so far avoid all the social and excellent temptations of Oxford as to stick to his books is likely to go far—if even only to the Civil Service. A first in Mods. is as good as a medal for a proof of character. A first in Greats or in Law or in History is a real test of mental grasp. But the undergraduate does not always see things from this standpoint. He wants some immediate proof of ability, and that the Union affords. The Presidency of the Union is the blue ribbon of Oxford success. From the practical point of view it is hardly less valuable than the First for any one who is entering the conjoint fields of Journalism, Literature, the Bar, or Politics. The aspirant submits himself to the judgment of his fellows who belong to the same University and have been nurtured in the same tradition, and if he succeeds in gaining their suffrages he knows that he has persuaded the last democratic community of intellect which has survived the middle ages.

The relation between the Union and the Houses of Commons and Lords has been a curious one. Success in the earlier sphere has so often

III. preceded a failure in the later one—and yet the Presidency has been as a whole the first step to a conspicuous Parliamentary career. I have tried to analyse in my own mind the reasons for this apparent divergence of principle and experience. A few test cases may perhaps suffice. A contemporary not given in any way to exaggeration said that Mr. Belloc at the Union was undoubtedly the greatest living orator of his age. "If Belloc," he said, "ever enters the House of Commons he will disrupt the party system." Mr. Belloc was not specially successful in the House of Commons. And yet the divergent judgments of both bodies are in a way understandable and right.

Mr. Belloc was undoubtedly a great orator. At Oxford he spoke out of the sincerity of his heart in noble English, and out of a fund of natural genius. He would even produce objects out of his pocket and juggle with them after the manner of a conjurer in order to attract the attention of his audience. At the Union he was an immense and unparalleled success. I can bear testimony to this, because I opposed Mr. Belloc on nearly all his great occasions. I remember when Mr. Belloc moved on May 18, 1893, with Lord Beauchamp in the Chair, "That this House would approve of any measure which gave undergraduates a share in the government of the University." Mr. Belloc made an excellent peroration, in which he described his scheme as a high, lofty, well-conceived cathedral, and I parodied his peroration in a somewhat unworthy fashion.

The other great example of the Union style

before my time was Mr. Herbert Paul, who, I am told, transmitted some of his gifts to his son, Mr. H. M. Paul, President of the Society in 1906. And yet neither Mr. Herbert Paul nor Mr. Belloc could catch the tone of the House of Commons. Why ? Because youth is not middle age. What was regarded as a fount of amusement or an intellectual treat at Oxford was looked on by the House of Commons as a form of trifling or insincerity. The judgment was absolutely unjust, but it doomed two brilliant men to political impotence and sterility. They had achieved an immense success in one school, they could not adapt themselves to another, and found their consolation in the art of letters. But here we are dealing with exceptions.

The story of the Oxford Union is far better exemplified in the advice believed to have been given by the late Raymond Asquith, " Learn to speak at the Union, because if you can learn to speak there really well you can learn to speak anywhere."

Raymond had the right to his opinion, because he of all men best exemplified the Union style. In him the mixture of satire, humour, honesty, wit, and solemnity undoubtedly reached its zenith. I was six years before his time, and though I certainly contributed something to the fruit, Raymond Asquith produced the final flower. It is quite possible that we were both nothing but the instruments of a common tradition based on the desire of pleasing the ladies in Eights week.

For it has long been a matter of dispute as to where the Oxford Union style of oratory finds

III. its origin. The best judges say that it comes from the fifteenth chapter of Gibbon, in which the eminent historian makes a veiled onslaught on the Christian Church couched in a very subtle form of irony. It is the style of youth—happy, irresponsible, mordant, treating serious subjects in a jesting, but omniscient, manner, and often fanatical about passing issues of little moment.

I was looking over the records of the Society the other day, and I was struck by two facts—the extraordinary storm aroused by Raymond Asquith when as Librarian he insisted on taking in some periodical which was offensive to the High Church party, and another tornado which burst out later, when it was proposed to appoint a Don as Senior Librarian. Raymond Asquith himself, white with passion, harangued an audience hardly less excited, and his persistence cost him the Presidency for a term.

Some kindly senior member of the University had for generations sat on the Library Committee and given a general direction of policy to that fleeting body in the immensely important work of supervising the acquisition of a magnificent collection of books, just as Mr. T. H. Grose and Mr. Sydney Ball (both now alas dead) used to supervise our finances as Senior Treasurer. Nobody thought that the undergraduate Junior Treasurer ought to have the management and control of thousands of pounds. Why not, therefore, have a Senior Librarian and avoid the sometimes awkward farce of a formal election to the Committee ?

Immediately a considerable number of members,

especially amongst the officers and ex-officers, were up in arms. "This Society is not to be run by the Dons," was the battle-cry.

Conferences of ex-Presidents were held in London, and the most notable orators were hurried down to the fray. The motion was passed and the change made amid tumult, and yet probably the average member to-day has not the slightest idea that the Senior Librarian has not existed since the Flood.

I record these incidents because I love the whimsical nature of the Society, whether it takes the form of the careless and affected cynicism of youth, or the fanatical earnestness of domestic controversy. There is many a minister who would prefer question time at the Union to the same performance at Westminster. "So far must I speak for memories' sake and linger in the passion of the past."

The politics of the Union puzzle the outsider and sometimes confound even the aspirants for office. It is quite a common thing for a full House to pass a Conservative resolution at the beginning of the term, and turn to accord a distinguished Liberal visitor a hearty vote of confidence three weeks later, or *vice versa*. Trusting journalists in London sometimes record these polite votes of thanks to the individual brilliance of the orator as sweeping political triumphs. But the politics of the Union are really a much more complex affair. Of course there is a strong Tory and Radical sentiment on either side, and when the full constituency turned up to a debate its sentiment was in my time, and I should

III. say certainly up to 1914, overwhelmingly Conservative.

The natural inference would be that such a body would tend to elect a long succession of Conservative officers. Yet it is far from being the case. Men of Liberal, Socialist, or Independent opinions constantly fill the Chair, and indeed the usual Conservative plaint at various times at Oxford has been that their representatives never had a fair share of the loaves and fishes. The truth is that while political sentiments do and must operate, they are held in check by a strong counteracting feeling that the object of the Union is to recognise ability. The man who has the power of speech ought to hold the high places of office irrespective of the particular views to which he gives expression. In my own time the honours were fairly evenly divided, and Lords Beauchamp, Crawford, and Donoughmore shared argument and office with Sir John Simon, Mr. Belloc, and Sir John Bradbury.

Later a long succession of Liberal Presidents sprang from the Russell Club to preside over a body which repudiated all their convictions. Again in a few years this domination was broken and the Tory Clubs triumphed in the period of Lord Wolmer, the Hon. Henry Lygon, and Mr. Maurice Woods. And the younger Conservatives who followed them certainly held their own end up. But all this is really due to the accident of personality. The undergraduate mind as expressed in the Union has not given way to that rigid adherence to a party or a faction which appears to be the heritage of our maturity.

In fact, in that glorious period when we were all prepared to argue for or against any proposition, just to see on the Socratic method how the argument would turn out, many terrible indiscretions were committed by those who have now settled down to the sober routine of politics.

A search through the records of the Society will produce many instances of strange opinions advanced by Right Honourable Gentlemen who have since been distinguished by inflexible consistency.

I will not take a mean advantage of my knowledge to pillory my colleagues or put my opponents to shame. I will only acknowledge the find that in the last century I moved a motion in favour of the Disestablishment of the Welsh Church. Why I ever did so or what arguments I employed are facts which simply defy my memory. But I most combatively excluded disendowment.

The danger of looking back into the past, however recent, is that the imagination colours it too favourably. Although the political frequenters of the Union undoubtedly formed a kind of fellowship, cemented by a general atmosphere of good feeling, there were fierce rivalries and personal antagonisms.

Men of diverse views and temperaments are contending for the same prize. Youth is in the first flush of public ambition and determined to succeed. As a result, the rule forbidding canvassing was a fruitful source of accusation and counter-charge. Legend says that it originated in the contest between Mr. Asquith and his Tory opponent, the late Sir Ellis Ashmead-Bartlett.

III. The latter was accused with a touch of exaggeration of having given breakfast to the whole of the University. A distinguished ex-President, now a Bishop, used to explain, "I never canvass: all I do is to go round to my friends and read them the rules against canvassing." The truth of the matter is that it is absurd to suppose that men will not try to do a good turn to their friends when they are not defying any real moral obligation. On the other hand the rule is a good one, because it prevents the practice developing into a nuisance or a scandal by reserving to the House the power of unseating the offender. The justification of the present state of the law can be found in the fact that it has never been necessary to use this power and in the high character and ability of the men who have been elected.

The Union of course has its heroes whom it delights to honour on occasion. The busts of Gladstone, Salisbury, and Asquith stand in the Debating Hall. Once a term some prominent public man is invited to address the audience. Some great speeches have therefore been heard by this strange, difficult, and attractive audience. I have heard it argued by different generations whether Mr. Gladstone's final address on Homer, Lord Rosebery's oration on unveiling the Salisbury bust, or Mr. Lloyd George's speech when, as a man hardly yet known, he defended the Free Trade case in 1903, was the most brilliant performance. And there have been others, too, of which it does not become me to speak.

But Mr. Gladstone was undoubtedly the favourite child of the Union. His Reform speech

of 1832 is the only undergraduate effort which history has taken to its record. He would probably have been horribly shocked by the modern development of the Union style. His power is not understood by a generation which has lost the recollection of his personality and tries to judge him purely by the intellect. Any one who has heard Gladstone speak would understand why the Greeks applied δεινός as an epithet descriptive of oratory—for it means at once "clever" and "terrible."

Lord Rosebery, who as contemporary of Randolph Churchill at Oxford admits with regret that he took no practical advantage of his membership, repented to the extent of delivering one of his most famous speeches in dealing with the career of Salisbury,—an oration which can be read with pleasure any day for the perfection of its literary style.

Mr. Asquith and Lord Curzon supply, in very different ways, instances of great ex-Presidents. Either would have been accounted a remarkable speaker almost at any epoch in which the art of rhetoric has been studied and applauded.

The main record of the Union is one of youthful prowess realised in the form of public service. The Society gave five Presidents to death in the War. Raymond Asquith, Gilbert Talbot, Robert Palmer, and their colleagues in the roll of honour looked forward with high hope to lofty and prosperous careers. Many of their older predecessors were debarred alike from the honour and the risk of battle. Yet in the public record of the country during the critical years of 1914

III. to 1918 the ex-Presidents of the Oxford Union hold an unchallengeable record. Seven of them held office as Cabinet Ministers under successive war governments—Asquith, Birkenhead, Crawford, Curzon, Milner, Robert Cecil, and Simon. Sir A. Griffith Boscawen misses inclusion, since he did not become Minister for Agriculture until just after the Armistice. Lord Beauchamp must be omitted for other reasons. Let our friends of the Cambridge Union now produce their rival list!

The War indeed tested all men, and the Union Society emerged triumphantly from the ordeal.

It would not be out of accord with the tradition of the Society if I concluded this essay on a serious note.

On many occasions I have been able to pass through Oxford and spend a few hours there. I often go to the Union and spend some minutes in its Victorian Debating Hall. The room is empty and the place is silent, but yet these walls have listened to nearly all the great masters of rhetoric, and the green benches have seated many of the most prominent figures of this age—Gladstone and Rosebery, Campbell-Bannerman and Asquith, Roberts, Hugh Cecil, Robert Cecil, Curzon and Milner, Chamberlain—the walls might seem to exude the very savour of oratory. But the portraits on the wall forbid the idea that Oxford depends in any way on the imported orator.

There these portraits hang, row upon row—a pictorial constellation of the past and the present. Bishops, Professors, Cardinals, Novelists, Scientists, Prime Ministers, High Commissioners, Editors, Chancellors of the Exchequer, Dons and

Philosophers, tier after tier of pictures remind an old member of the past, or encourage a new member to advance boldly into the future of the practical life which lies before him. Here are Salisbury, Gladstone, and Asquith standing on their enduring pedestals—Manning and Mandell Creighton, E. T. Cook, York Powell, the Cecils and the Asquiths, the Mowbrays and the Talbots, and on the living rôle of fame, Milner and Curzon, Anthony Hope and A. E. W. Mason. Here within a single chamber lies the sifted ability of Oxford. The pictures, the photographs, the etchings and the busts possess all the charm and demand all the reverence which we might give to some Gothic cathedral raised by the piety of our ancestors to commemorate a belief in the joy and the high destiny of their successors.

## IV

## A MINISTRY OF JUSTICE

IV. During the months which immediately preceded and immediately followed the Armistice, proposals for the reconstruction of the machinery of the constitution and the redistribution of functions to the various Government offices formed a frequent subject for discussion. It was then supposed that most of the evils from which mankind suffers could be redressed by the creation of a new Ministry. It would have been strange if, in this atmosphere, the minds of some of those interested in the administration of the law had not turned to the idea of a Ministry of Justice. The first impulse to the revival of the idea had indeed already come from the evidence given by Lord Haldane before the Royal Commission on the Civil Service in July 1915.

Lord Haldane's mind, affected by experience in the great office of Secretary of State for War, and interested by inborn faculties, and by philosophic training, in the problems of orderly government, had a natural affinity for the ideas which may be traced to Bentham ; and coming to the Woolsack from that highly organised institution, the War Office, which owes so much of its

organic efficiency to his labours, he was naturally struck by the difficulty with which the work of the Lord Chancellor must be carried on, and by the necessity for the creation of a more efficient machine. IV.

But Lord Haldane was not the first Lord Chancellor who had been captivated by the idea. The prolific and unstable mind of Brougham for many years harboured this with many other projects, some of which have proved fruitful and some sterile. In 1836, partly perhaps by reason of Bentham's proposals, and partly as a consequence of the difficulties of the time, the Whig Government of Lord Melbourne introduced into the House of Lords a Bill which would have effected one of the objects aimed at by the advocates of a Ministry of Justice, namely, that of dividing the duties of the Lord Chancellor into two. One part of the functions of the Lord Chancellor—that of presiding permanently in the Court of Chancery—was to be assigned to a new Judge. Another part—that of sitting as a Judge of Appeal in the House of Lords and the Privy Council—was to be exercised by a Judge who would go in and out of office with the Administration, and would retain the title of Lord Chancellor. This proposal appears to have had the support of Lord Cottenham, L.C., who introduced the Bill, Lord Denman, L.C.J., and the Attorney-General (Sir John Campbell, afterwards Lord Campbell and Lord Chancellor). But it was defeated upon the Second Reading in the House of Lords by an overwhelming majority. Lord Lyndhurst opposed it—as might have been expected ; but it is

IV. stated by Campbell [1] that its defeat was due in the main to the discredit brought upon it by the speech of Lord Langdale, M.R., who, though he voted for the Second Reading, "delivered a good prepared speech expounding his Benthamite notions upon the judicial character, and explaining how there ought to be a tripartite division of the Lord Chancellor—one-third to sit in the Court of Chancery under the ancient title, one-third to sit in the House of Lords and Privy Council under the title of 'Lord President in matter of Appeals and Writs of Error,' and one-third to superintend the administration and improvement of the law under the title of 'Minister of Justice.'"

Lord Langdale's speech is a succinct and lucid description of the system of the day.[2] It is difficult to see why the speech should have had the effect described by Lord Campbell, but Lord Langdale's proposals for a tripartite division correspond closely with the modern idea of a Ministry of Justice. In effect, the proposals of Lord Cottenham's Bill have long ago passed into law, though in a very different form, and the Lord Chancellor no longer sits in the ordinary course of his duty both as an appellate Judge and as a Judge of First Instance. The question now is whether there should be such a further severance as Lord Langdale desired between the political and administrative functions on the one hand, and the judicial functions on the other, and whether the former set of functions should

[1] *Life of Lord Campbell*, vol. ii. p. 82.
[2] Hansard, 3rd Series, vol. xxxiv. at page 44.

be committed to a Minister of Justice, *eo nomine*, and not to the Lord Chancellor of the day.

Again in 1857 Mr. Napier (afterwards Sir Joseph Napier, Lord Chancellor of Ireland) moved in the Commons a motion for the formation of a separate department of public justice, charged with the general supervision of the legal and judicial business of the country. It fell to the lot of the then Attorney-General, Sir Richard Bethell —afterwards Lord Westbury, Lord Chancellor— to reply to Sir Joseph's motion. He took the view that the objects in that motion could be more effectually carried out by means of the existing machinery, "for it would be impossible to place in the Cabinet a new Minister of Justice so long as the Lord Chancellor and the Home Secretary were both members of it, without introducing discordant functions and the possibilities of disagreement where unity was essential . . . he believed that it would be in the power of the Lord Chancellor, if furnished with a sufficient staff, to accomplish the three great objects in view—a general superintendence over the administration of justice in all its departments; the effective prosecution of amendments of the law; and the giving prompt and effectual assistance in conducting the business of current legislation." [1]

It is not without interest to examine the circumstances in which the writings of Bentham on the subject were produced and considered, and in which Lord Cottenham's proposals were brought before the House of Lords in 1836.

[1] Nash's *Life of Lord Westbury*, vol. i. pp. 189, 190.

IV. Lord Eldon had held the Lord Chancellorship from 1801 to 1827, except for a brief interval between February 1806 and April 1807, when the Great Seal had been in the custody of Lord Erskine. This is not an opportunity on which to attempt an estimate of the contribution made by Lord Eldon to the jurisprudence of this country, but, without undue disparagement, it may at least be said that, whatever his great qualities as a Judge and whatever his services in the growth and settlement of the doctrines of equity, his mind was notoriously inclined rather to delay than to haste, and that, both by constitution and by experience, he was without sympathy for the reform either of the substantive law, or of the methods of the administration of justice. Furthermore, during his later years he was without any colleague in the House of Lords who had held high legal office. When Lord Lyndhurst succeeded him Lord Eldon was already too far advanced in years to offer material assistance in the hearing of appeals. It was not until the brief reigns of Lyndhurst and Brougham were over, and Cottenham sat upon the Woolsack, that the House of Lords contained any such number of legal peers as could be considered by the greatest optimist sufficient to cope with the legal work of that assembly. Lord Brougham's reconstruction of the Judicial Committee added a further burden to such peers as were available to bear it. Though the elevation to the peerage of Bickersteth under the title of Lord Langdale added a further member, the lack of numerical strength for judicial business was felt grievously

before 1836, and indeed continued to be felt until the passing of the Appellate Jurisdiction Act of 1876; while the methods adopted by those Peers who sat, as recorded in the memoirs of their contemporaries, tend rather to the amusement than to the edification of succeeding generations. IV.

In the early days, therefore, the Lord Chancellor sat alone as a Judge of First Instance. He sat alone on appeal from the Master of the Rolls and, when Eldon was at last persuaded to agree to the appointment of a Vice-Chancellor, from the Vice-Chancellor. He sat again alone in the House of Lords as a Court of Appeal from himself or on a Writ of Error from the Common Law Courts, except when he obtained the assistance of some of the few peers who were available to sit with him.

In 1841 the Equity jurisdiction of the Court of Exchequer was transferred to the Court of Chancery, and two Lords Justices were added to the judicial strength of the latter Court. But the resulting relief was slight, if any, for the Lord Chancellor frequently sat with them. Hence came Bethell's bitter jibe at Lord Chancellor Cranworth. "I wonder," said an eminent practitioner, "what makes old Cranny sit with the Lords Justices." "I take it," said Bethell, "a childish fear of being left alone in the dark."

But the delays arose not only, indeed not so much, from the difficulties experienced by the Lord Chancellor in being in three places at once, as from the nature of the procedure itself. Even when, in the fourth decade of the nineteenth century, the judicial staff of the Court of Chancery

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amounted to seven (Lord Chancellor, Master of the Rolls, two Lords Justices, three Vice-Chancellors) as against two in Eldon's early days, the state of business in the Court would have been ridiculous, had it not been scandalous. A suit in Chancery, oscillating between the Judge and Master, might, and often did, endure for years. The system of Master's Hourly Warrants limited the time which any Master could give to it at any one sitting. Finally, when it reached the Supreme Appellate Tribunal, years might elapse before it received an audience, and, when it did, and the hopes of the litigant seemed on the point of fruition, the death of the Chancellor or his removal from office might render the whole proceedings in the Lords abortive, and require a fresh hearing.

The delay which resulted from these arrangements was as disastrous as might have been expected. In days in which the legal reformer finds it difficult to arouse sufficient interest to ensure the passing of the simplest measure of law reform, one is sometimes tempted to look back almost with regret to the time when not only were men's minds stirred by the writings of Bentham and his disciples, but when the practical hindrance to business was so great as to amount to a denial of justice, and when it was possible for a popular novelist to render the proceedings of the Court of Chancery both picturesque and tragic. There was not only ample ground for alteration — there was a most urgent necessity. That state of things has entirely passed away. It would be idle to

suggest that no improvements are needed in the administration of the law, and that no delay ever hinders the suitor in the prosecution of his rights or deprives him of their fruit. But such delays as now exist are due not to any difficulty in machinery but to the enormous growth in litigation. The remedy for them is simple and easy. Some slight readjustment may be necessary as between the different Divisions of the High Court. If the present pressure continues, some addition may be required to the judicial strength. But on the whole the machinery works simply and easily, and it has been so devised that the difficulty of readjusting it to the circumstances of the present day arises, not from any inherent vice in the material, but from the fact that the legislature is so deeply engrossed in problems which appear more pressing and important that time is lacking for the consideration of legal measures.

Furthermore, such delay in the administration of justice as now exists is in no way due to the position or the functions of the Lord Chancellor. The Judicature Acts of 1873 and 1875 in effect abolished the functions of the Lord Chancellor as a Judge of First Instance and as a Judge of the Intermediate Court of Appeal, though they left him free, should he think that exceptional circumstances called for his assistance, to render help to his brethren in any Division of the High Court or in the Court of Appeal. Nor does any delay exist in the legal work of the House of Lords. The Appellate Jurisdiction Act, 1876, supplemented by the Appellate Jurisdiction Act,

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1913, furnish to the House of Lords and to the Judicial Committee the regular attendance of a staff of Judges. The Judges appointed under these Statutes are few and they could not cope unaided with the heavy work which falls to them, but they are assisted by the incessant labours of those Peers who have held the office of Lord Chancellor, and of other Peers of great judicial experience. Both Tribunals are thus enabled to do their work in a manner worthy of their great prestige and the vast amplitude of the jurisdiction. There is certainly no delay, and there are no arrears in the work of either of the Supreme Imperial Courts.

Other changes in the administration of the law have, since the date of Lord Cottenham's Bill, further relieved the burden borne by the Lord Chancellor.

A series of Statutes, culminating in the Lunacy Act of 1852, have in effect transferred most of the duties which rested upon him in relation to lunatics to the Lords Justices, the Commissioners in Lunacy (now the Board of Control) and the Masters and Visitors in Lunacy; though the Masters and Visitors are still the Lord Chancellor's officers, and the Lord Chancellor himself still remains in the position of a chief superintendent or guardian for every lunatic, or alleged lunatic, in England and Wales.

During the same period successive Acts relating to bankrupts and insolvent debtors have removed from the Lord Chancellor's office a very heavy burden of work. Petitions in bankruptcy were heard by the Lord Chancellor in person and

it was a frequent complaint against Lord Eldon that he had heard " lunatic and bankrupt petitions rather than other matters in order to get money." The extent of the encroachment upon the Lord Chancellor's time caused by these hearings can be gathered from Eldon's own statement: " I had for 22 years administered all matters in lunacy without receiving one farthing, and as to petitions in bankruptcy 12s. 6d. was all that was paid for a petition which sometimes occupied 4, 5, 6, 7, 8, or even 10 days."[1] It may be remarked in passing that, however small the payment on each petition, the Lord Chancellor's income from bankruptcy appears to have amounted to between £3000 and £4000.[2]

Meanwhile there has also been a change in the office of the Lord Chancellor which has a direct effect upon the question of the administration of justice, that is, the creation of the permanent secretariat to the Lord Chancellor—the offspring of Lord Selborne and of Lord Muir Mackenzie. Until the constitution of the permanent office the Secretaries to the Lord Chancellor came in and went out with him, and with them there went out such records as were made of the Lord Chancellor's activities; and in large measure any plans which he might have formed for the amelioration of the law, except so far as they were expressed in the proceedings of Parliament, or of commissioners or parliamentary committee, were dissipated. Any assistance which was needed for the consideration of a reform or for

[1] Twiss's *Lord Eldon*, vol. ii. p. 489.
[2] *Ibid.* vol. ii. p. 586.

IV. the preparation of a Bill had to be obtained *ad hoc* and temporarily. Westbury wrote in 1863, "If the Cabinet agreed to the introduction of such a measure (an amendment of the Game Laws) I would gladly charge myself with it; but for that which renders my position irksome, namely, the necessity of resorting to the Chancellor of the Exchequer. The parsimony of former times has stripped the high office of Lord Chancellor of all that was requisite to enable the Lord Chancellor to act in a suitable manner as head of the law. Thus I have not a person in my service, nor the means of employing a person, to whom I could commit the preparation of such a Bill and the duty of making such researches as are necessary before preparing it. If any amendment of the law seems to me desirable, I must beg for the approval of the Home Secretary, and, through him, the sanction of the Chancellor of the Exchequer. My secretary writes to Sir George Grey requesting him to move the Chancellor of the Exchequer to consent that the Lord Chancellor may have a small sum of money to pay the gentleman he may employ to effect the necessary reform. After weeks of delay, an official letter comes from Mr. Peel or some subordinate, doling out some niggardly sum, as if it were a favour, and often with the most absurd stipulations. Such is the *circuitus officialis* for which Dickens has substituted felicitously "circumlocution." [1]

It must not be deduced from these observations that the Lord Chancellor is not a very

[1] *Life of Lord Westbury*, vol. ii. p. 44.

heavily burdened Minister. He is Speaker of the House of Lords, and, on the days on which that House sits for business other than judicial, he must in practice be present during the whole period of its deliberation. He must sit frequently for judicial business in the House of Lords and on the Judicial Committee. In addition he has to perform the ordinary duties of a departmental minister and to take part in the deliberations of the Cabinet. The fact that many hours of his time are occupied by sitting upon the Woolsack differentiates his position from that of any other Cabinet Minister, since his colleagues, though they are bound during the sittings of Parliament to attend in the House to which they belong, are in practice free to attend to their own departmental business in their own rooms or offices, except when that business forms the subject of discussion in the Chamber itself; further, they have no such fetter upon their time as is involved in sitting in the morning and early afternoon for judicial purposes. IV.

The main object, therefore, sought to be effected by the advocates for a Ministry of Justice during the nineteenth century has been effected; that is to say, the Lord Chancellor is no longer required to perform judicial functions which are greatly in excess of the time available for him, with consequent delays in the administration of justice itself. What then are the objects sought to be effected by those who now propose the establishment of a separate Minister?

It is alleged in the first place that it is desirable that the patronage which forms an important

IV. part of the functions of the Lord Chancellor should be exercised by a Minister who is directly responsible to Parliament in the House of Commons.

Secondly, it is pointed out that there are functions, which in another country would be performed by one Ministry or Minister, but which in this country are performed some by the Lord Chancellor, some by the Home Secretary, and some by the President of the Board of Trade, and some by other officials.

Thirdly, it is suggested that there is a necessity for some central office, and some central Minister, charged with the whole patronage connected with the administration of justice, and with the general superintendence of all the administration of justice, and with all suggested improvements in it, particularly with the work of consolidation and codification of the law, with the revision of practice, and procedure, and with the finance of justice generally.

Lastly, it is said that it is a wrong principle that any one man should unite in his own person the office both of a Judge and of a Minister of the Crown forming part of the executive, and further, that, as a matter of practice, the union of these two sets of functions must necessarily result in the neglect of one or perhaps both sets.

There is substance in all these observations. Before they are considered in detail it is worth while to bear in mind the history of the development of English legal institutions during the last hundred years. If some eminent lawyer had fallen asleep in the last year of Lord Eldon's Chancellorship, and were now to awake—in the

year 1921—and contemplate the machinery of justice as it now exists, he would be unable to recognise the legal world in which he had lived. The change in the position of the Lord Chancellor has been already briefly sketched in the earlier paragraphs of this article. But other changes, as far-reaching, and probably far more bewildering to Lord Eldon's contemporaries, have been effected. Law and Equity have been fused and have taken up their habitation under one roof in the Strand. The country is covered with a network of highly organised local courts, exercising a homogeneous system of law, and the local courts then existing have been either reformed or abolished. The law relating to evidence has been completely changed. Instead of the old Chancery system of affidavits, evidence is given throughout the country *viva voce*. The parties to suits and their husbands and wives are competent and in some cases compellable witnesses. The law of intestate succession both to realty and personalty has been changed; so has the law relating to husband and wife, as regards both property and the severance of the marriage tie. The Ecclesiastical Courts have been abolished. The law of real property has been affected by a series of Statutes dealing with conveyancing, settled land, and land transfer. The law relating to bankruptcy is completely new. The law relating to Joint Stock Companies has been conceived, born, and grown to maturity. The Acts associated with the name of Lord Campbell have altered the law of libel, and given a new remedy to dependents in certain cases of death by

IV. negligence. On the criminal side the changes are no less far-reaching. The penalty of death then applicable to a large variety of offences is now confined to that of murder. Prisoners can give evidence on their own behalf. A Court of Criminal Appeal has been established.

The changes thus enumerated take account only of those alterations of the law which might have been expected to emanate from a Ministry of Justice as affecting what may be called the machinery of justice. In addition many large measures of consolidation and codification have been prepared and passed through Parliament.

These Statutes represent in the main the contributions made to the reform of the law by successive Lord Chancellors and Attorney-Generals during the nineteenth century. It is true that the most important of them were passed in the first three-quarters of the century, when the successive efforts to improve the legal system were crowned by the Supreme Court of Judicature Acts of 1873 and 1875, and it would not be strange if in the succeeding 45 years (7 of which were years of war) there had been some pause in the work. Yet those 45 years, to take the Supreme Court alone, have seen the passing of 27 Statutes affecting its constitution or its functions on the civil side, in addition to those Statutes which originated directly in the state of war. They have also seen the passing of the Court of Criminal Appeal Act, the Settled Land Act, the Married Women's Property Act, the Conveyancing Act, and their numerous amendments, Lord Halsbury's Land Transfer Act of

1897, the Criminal Evidence Act, as well as a very great number of smaller enactments which in one way or another touch the administration of justice. IV.

This hasty enumeration is not a full catalogue of the legislation of the period: still less does it exhaust all that might have been done, nor suggest that much does not yet remain to be done. It may also fairly be urged that many of these reforms were long overdue by the time when they came into operation. It by no means follows, however, that reform would have been more rapid, more extensive, or more efficient, had it been conducted under the superintendence, or on the initiative, of some Minister of Justice other than the Lord Chancellor or Attorney-General of the day. Lawyers are generally credited with an obstinate conservatism of view with regard to legal institutions. It is true that in the profession of the law, in which authority depends largely upon successful practice, success is in most cases attained only at a mature age, when the mind might be expected to have acquired a suspicion of novelty, and a respect for wont and tradition. Furthermore, a far-reaching change in law or in procedure may involve the practitioner at a mature age in the jettison of the accumulated learning of a life-time; and the interests often at stake, whether they involve life or character or property, are frequently so vast that an experienced lawyer is slow to be convinced that some new remedy may not produce unforeseen consequences, worse than the disease which it is intended to heal.

IV. Yet the reforms mentioned were designed and carried into operation by lawyers, led by those who had been trained in their own profession, and who still held a place, either in its active ranks or upon its judicial side. In a country in which the judiciary is wholly separate from the Bar, it is perhaps natural that reform or alteration should spring from outside the profession of the law. In England such a process is impossible. Both Houses of Parliament contain many experienced and acute lawyers—in the House of Commons still practising their profession, in the House of Lords actively engaged as Judges—whose general assistance is available upon such matters, and whose general sense must be enlisted if the highly technical subjects involved are to be dealt with practically, and if the legislature is to be convinced of the desirability of passing them into law. The chief obstacle in passing measures of legal reform lies, and always has lain, not in the conservatism of lawyers, but in the congestion of Parliamentary business. From time to time some wave of popular interest, having its origin in some notorious case of admitted hardship, which may or may not be of first importance, sweeps over the public mind, and under its influence some advance is made. But for the most part the public take but little interest in the machinery of the law, which is in itself difficult to understand and makes but small appeal to the popular imagination. Legal reforms, if they are to come at all, must come through the conviction of the general body of both professions and through the

persistent efforts of the leaders of both professions, first to educate their professional colleagues, and then to convince their colleagues in the Cabinet.

What would be the position of a Minister of Justice in the face of this task ?

Let us first consider what kind of training or experience or position would be possessed by the Minister.

He might be a layman, that is, neither a barrister nor a solicitor. It is customary in this country to appoint to the War Office or to the Admiralty peers or members of the House of Commons who have no professional experience of the Army or Navy. But the analogy probably could not hold good as respects the Ministry of Justice. It may be taken for granted that, as in the case of the Home Office, some degree of legal experience would usually be deemed requisite. If he is to be a lawyer, it would in all probability follow that he is a member of the Bar. His position would be one of great embarrassment, upon the hypothesis, for there would rest in his hands the whole of the legal patronage of England and Wales, that is to say, the appointment not only of the High Court and County Court Judges (now in the Lord Chancellor's hands), but also of the Lord Chief Justice of England, the Lords of Appeal in Ordinary, the Master of the Rolls, the President of the Probate, Divorce, and Admiralty Division, and the Lords Justices, all of which appointments at present rest with the Prime Minister. It is obvious that the Minister of Justice cannot appoint himself to any one of

IV. these positions, and it would follow that the position would be held, if held by a barrister, only by one who regarded himself as shut out from any of those objects of ambition which are generally looked for as the crown of a successful career at the Bar. The positions of Attorney-General and Solicitor-General must necessarily be held by men who are still in the active practice of their profession. Neither of these officials would be likely to prefer the office of Minister of Justice. His income must necessarily be less than that of the position which they occupy, and his office could not form the avenue to any great permanent judicial appointment.

It would seem to follow that the Minister of Justice, if a barrister, must be a barrister who has ceased to look for professional or judicial advancement, and who will, therefore, not carry into the office any of that great prestige among his fellows which results from success in advocacy, or learning in jurisprudence.

The Minister of Justice cannot stand to the Government in the position of a legal adviser. That function must still be fulfilled by the Attorney- and Solicitor-Generals, engaged for the Government in the active work of their profession, and able to advise the Government from the detached point of view in which the advocate stands to his client. The disappearance of the Lord Chancellor, who is at present, equally with the Law Officers, supreme legal adviser to the State, would greatly enhance the position of the Attorney-General, and it may confidently be expected that there would be a general reversion

to the practice whereby the Attorney-General sat in the Cabinet. IV.

The Minister of Justice, therefore, would find himself in the Cabinet side by side with an officer of great legal experience, versed in the everyday work of the Courts, whose opinion on any technical point would necessarily outweigh that of the Minister, and whose experience both of Bench and of Bar, derived from constant intercourse with both, must, if it be at variance with that of the Minister, cause great friction.

Even if the Attorney-General does not sit in the Cabinet he must constantly be called in to consultation by the Government, both on matters pending in the Courts in which the Government is interested, and many matters of policy into the decision of which legal interpretations enter. It is very difficult to see how the Minister of Justice will in these circumstances be able to play a prominent part. It would appear probable, therefore, that the office will, as a rule, be held by some aspiring but imperfectly established statesman who may be glad to quit the office, when opportunity offers, for spheres which afford greater scope and deal with subjects which make a greater appeal to the imagination.

Outside the Cabinet, the Minister of Justice will be generally in touch with the Lord Chief Justice of England and the Master of the Rolls. It is one of the main excellencies of the legislation of 1873 and 1875 that they constituted a President of the Supreme Court in the person of the Lord Chancellor. A Lord Chancellor cannot indeed stand to a Lord Chief Justice, a Master of the

IV. Rolls, or any other member of the Judicial Bench, in the position of master to servant, or superior to inferior. He does stand to them, however, in the position of a colleague placed by Parliament in the position of President, and, whatever his own personality, he is of necessity in their view, in origin, a member of their profession who has attained to pre-eminence in it, and has conducted much litigation either against them or with them or even before them. *Prima facie*, what a person in such a position has to say to his colleagues, whether by way of suggestion or complaint, is deserving of, and necessarily receives, consideration. But beyond this, he is also to them the representative of the executive Government. He cannot influence the decision at which any one of the Judges may arrive in his judicial capacity, but all the Judges plainly recognise that on general points of principle he is responsible to Parliament for the general conduct of the legal establishments.

A Minister of Justice with the position and experience described above cannot hold such a position of influence with the judiciary, nor, indeed, from the nature of things, can his opinion on legal matters carry any very great weight. The position of the Lord Chief Justice and of the Master of the Rolls must, like that of the Attorney-General, be enhanced by the disappearance of the Lord Chancellor. In every democracy there arise from time to time occasions of jealousy and difficulty between the judiciary and the executive. Our present system, under which the head of the judiciary is also a prominent member of the

executive Government, has its disadvantages. But it has this great advantage—that it provides a link between the two sets of institutions; if they are totally severed there will disappear with them any controlling or suggestive force exterior to the Judges themselves, and it is difficult to believe that there is no necessity for the existence of such a personality, imbued on the one hand with legal ideas and habits of thought, and aware on the other of the problems which engage the attention of the executive Government. In the absence of such a person the judiciary and executive are likely enough to drift asunder to the point of a violent separation, followed by a still more violent and disastrous collision. IV.

For one who has lived the life of an active practising barrister, and has during that life depended upon the support and wisdom of members of the solicitor's profession, it is difficult to discuss the delicate subject of the effect of the appointment of a member of that branch of the law to the position of Minister of Justice. It suffices to say that, while among solicitors there may be found many who have it in their power to make a contribution of first importance to our jurisprudence, whether on matters of substance or of procedure, and while the Law Society is active to promote measures of legal reform and to give sympathetic consideration to such measures when suggested from without their own body, there is no reason to suppose that the position of a solicitor Minister of Justice would be any happier than that of a barrister who held that office.

IV. In the result, therefore, it must follow that, if the Ministry of Justice is severed from the office of Lord Chancellor, the person occupying the position of Minister of Justice will not bring to the discharge of his duties the great authority in the law which years of past professional success have as a historical fact imparted to those who have been appointed to the office of Lord Chancellor. Furthermore, it is most improbable that any person so appointed should possess the strength of personality which, in the past, has been the characteristic of the holders of the office of Lord Chancellor. If the nineteenth century alone be taken, the Great Seal was at its commencement in the hands of Lord Loughborough, and at its close in the hands of Lord Halsbury. The mere catalogue of those who occupied the Woolsack in the intervening period — Eldon, Erskine, Lyndhurst, Brougham, Cottenham, Truro, St. Leonards, Cranworth, Chelmsford, Campbell, Westbury, Cairns, Hatherley, Selborne, and Herschell—is in itself a summary of the contribution made by successive Lord Chancellors to the growth of English jurisprudence and to English political life. Reviewing, as I write, this long retrospect, I shall not be suspected of any personal vanity, if I say that to attain such success as leads either to the Woolsack or to the Judicial Bench requires, in addition to intellectual gifts of the highest order, inborn qualities of vigour, courage, determination, and perseverance, hardened and sharpened by long years of labour and of conflict. These qualities in their highest degree cannot with confidence be looked for

among the ranks of those who, if my previous argument is well founded, will alone be eligible for the position. IV.

A Minister of Justice thus equipped with neither the prestige, the authority, nor the personality with which previous Lord Chancellors have been endowed upon their entrance into office, will find himself in consultation, possibly in conflict—however friendly—with the great lawyers of the time, of some one or more of whom it may be predicated that he will over-top the Minister, both in the Council Chamber and in the opinion of both branches of the profession. What prospect is there that the work of law reform will be pushed on with spirit and firmness, or that the work of patronage will be performed with independence and with knowledge, when, on the hypothesis, they are committed to a Minister whose intellectual powers are inferior, whose opinion with his own profession has less weight, and whose natural force does not possess the same momentum as that of the Lord Chancellor in the past or of the great legal officers in the future ?

I turn to consider the proposal as it relates to patronage. At present, as has been already stated, legal patronage is in several different hands. The great judicial officers whose appointments rest with the Prime Minister are enumerated above. Certain minor legal patronage in the Supreme Court is exercised by the Lord Chief Justice of England and by the Master of the Rolls ; the patronage in the Probate Registry and in the District Probate Registries is exercised by the President of the Probate Court ; Recorders and

IV. Stipendiary Magistrates are appointed by the Home Secretary; Indian and Colonial Judges are appointed by the Secretary of State for India and by the Colonial Secretary respectively; County Court Judges in Lancashire, the Vice-Chancellor of the Palatine Court and other officers of that Court by the Chancellor of the Duchy. Academically, a strong case can be made out for the concentration of all this patronage in one set of hands, whether they be those of the Lord Chancellor, as he now is, or of some Minister of Justice who is not the Lord Chancellor. If the Indian and Colonial Judges are excluded, there is indeed no reason, but a historical one, for the present system. Inconvenience is caused and administration is hampered by the fact that the patronage is thus scattered.

It is further argued in support of the proposal that in the past the Lord Chancellor's administration of such of the patronage as falls to himself has been the subject of fierce criticism. The structure of the constitution, under which the chief legal advisers of the Crown have necessarily to be chosen for reasons which are at least in part political, has as it is suggested coloured to some extent the whole administration of the patronage, so that notoriously political services have been weighed with, or to the exclusion of, other qualifications, when the claims of candidates for judicial offices have been considered. The advocates of the change hope, therefore, that the removal of the patronage from the Lord Chancellor, who sits apart from and immune to the criticism of the House of Commons, would result in improvement.

It may be argued, on the other hand, that these premises are themselves faulty and that from any change precisely the contrary result would ensue. In the past, political services have weighed far less with the Lord Chancellor than common belief has supposed. Of late years, at any rate, appointments to high judicial offices, including the appointment of County Court Judges, have been made without any reference to political services. Ambitious and capable lawyers are to be found in the House of Commons as elsewhere, and it is impossible to regard membership of that House as a disqualification. If it were so regarded, the effect would be twofold. The House of Commons would lose the services of all those lawyers who look in the main for success in a legal career, and the Bench would lose the services of all those lawyers who are not prepared to surrender the privilege of every citizen to present himself to the franchise of his fellow countrymen, and to take a part in the government of the country as a member of Parliament. It is curious to look at the composition of the Supreme Court as it now is. Neither the Lord Chief Justice of England,[1] the Master of the Rolls, nor any one of the five Lords Justices has ever sat in Parliament. Two out of the 6 Chancery Judges have so sat, as have also 6 out of 17 of the puisne Judges of the King's Bench. The President of the Probate, Divorce, and Admiralty Division has sat in Parliament. The puisne Judge of that Division has not. It is difficult to state the situation as regards the County Court Judges with statistical

[1] Written in 1921.

IV. accuracy, but apparently about 6 out of 54 have sat in Parliament. I state these facts not by way of apology, but to demonstrate how ill-informed is any criticism based on the supposition that the Lord Chancellor's patronage has for many years past been actuated by any political motives.

In truth, of late years, while the Lord Chancellor has not ceased to be a statesman, he has attained far greater freedom from political influence than was possessed by his predecessors of the eighteenth, and the early part of the nineteenth century, and is pre-eminently in a position to exercise his patronage with sole regard to the appointment of the best men. He is in fact subjected daily to the pressure of another kind of opinion, that, namely, of the Bench and of the Bar, which forms very definite views upon the capacity both of Judges and of barristers, is extremely quick to recognise merit and to detect imposture, and is by no means averse from expressing those views when occasion arises. The public opinion of a highly organised profession, which is both learned and honest, is the most healthy influence which could be brought to bear upon the dispenser of patronage, as it is the firmest support of him who, in his arduous task of selecting the best men, endeavours to discharge it rightly.

On the other hand, the very fact that the Lord Chancellor is not a member of the House of Commons, is neither subjected to the daily pressure of the personal and political intimacies formed in that House, nor swayed by the neces-

sity of conciliating any one at the critical stages of a critical Bill, enables him to take a broader view. It may be questioned whether the Minister of Justice will have the same freedom. Seeing the life of the House of Commons from day to day, his brain must constantly be preoccupied with the political considerations of the moment. It may be that some important section of opinion in that House sets its mind upon the promotion of one of its members to high judicial office, either as a reward for his services, or as a convenient retreat for one whose active presence among them has become embarrassing. It may further be that the support of that section may be necessary for the Government of the day, and even, as it may appear to the Government of the day, that the continued existence of that Government may be a national necessity. In these circumstances, the pressure upon the Minister of Justice, sitting in the Commons, would be unbearable. It would be rash to assert that no Lord Chancellor has ever been placed in a similar position or that no Lord Chancellor, being so placed, has bowed his head to the party desire for an appointment which, though perhaps not wholly unworthy, is not the worthiest. But it is safe to say that he is in a far better position to resist than the Minister of Justice could be, and that, in the past, Lord Chancellors have from time to time been subjected to such pressure and have withstood it.

Even lawyers are sometimes human, and it may be difficult for a man, who regards himself as in all respects the most fitted for promotion,

IV. to form a just appreciation of the merits of one who is preferred before him; while it is a characteristic of human nature generally to attribute to so lonely and austere an official as the Lord Chancellor motives of favouritism or political partisanship. If on any occasion in the past the political services of a person appointed have been more apparent than his qualities as a lawyer, the appointment has been at once the obvious prey of comment and criticism. The innumerable occasions upon which political pressure has been applied in vain are of necessity buried in silence. Still from time to time the public have been allowed a glimpse into these mysteries. Two instances occur to me of the way in which Lord Chancellors in the past have regarded their trust.

"On occasion of a vacancy on the Bench," says Lord Eldon, "by the death of one of the puisne Judges, the Prime Minister of that day took upon himself to recommend a certain gentleman to the King as a very fit person to fill that vacancy; and finding there was a disposition in the King to take that recommendation, I very respectfully urged that it was on the responsibility of the Lord Chancellor that these Judges were appointed, and that I should not consider myself worthy of holding the Great Seal if I permitted the advice of any other man to be taken—at the same time tendering my resignation. The Minister gave way, and the gentleman I recommended was appointed."[1]

In more modern times an even more audacious

[1] Campbell's *Lives of Lord Chancellors*, vol. vii. p. 678.

attempt was made upon the virtue of the Lord Chancellor. In February 1868, Mr. Disraeli wrote to Lord Chelmsford as follows :— IV.

DEAR LORD CHANCELLOR,—After all, I regret to observe that Mr. Justice Shee is no more. The claims of our legal friends in the House of Commons, supported as they are by much sympathy on our Benches, must not be treated with indifference, and therefore I venture to express a hope that you will not decide on the successor of Mr. Justice Shee with any precipitation.—Yours very faithfully, B. DISRAELI.

"I cannot describe," wrote Lord Chelmsford afterwards, "the painful impression produced upon my mind by this dictation of the mode in which the highest duty of a Chancellor, that of selecting fit men for the Judicial Bench, was to be performed." . . . The Chancellor answered the letter "by stating my views of the sacred character of the trust, that fitness and not politics ought to govern me in the choice of a judge, and that I would not suffer the smallest interference with my judicial appointments, the whole responsibility of which I alone must bear."[1]

Unfortunately virtue is not always rewarded by anything except its own consciousness of itself. Mr. Buckle (*Life of Disraeli*, vol. iv. p. 593) makes the somewhat ungenerous comment that the Prime Minister's letter was "a not unreasonable request, which has been made by many leaders of the House and complied with, perhaps too often, by many Chancellors," though he does not give, and it may be doubted if any one could give, examples of such a compliance; but,

[1] Atlay's *Victorian Chancellors*, vol. ii. pp. 121, 122.

IV. in addition to his posthumous failure to attract Mr. Buckle's sympathy, within a week Lord Chelmsford had ceased to be Lord Chancellor, and at no very distant date Mr. Huddleston, whose appointment the Prime Minister had contemplated—" the last man whom Chelmsford was disposed to select at this juncture "—sat on the puisne Bench. The circumstances were peculiar. Mr. Disraeli had at hand a far stronger candidate than Lord Chelmsford for the office of Lord Chancellor. It is not often that a Prime Minister has in reserve a man of the eminence of Lord Cairns. What would be the position of a Minister of Justice who held his office upon the tenure that, if he did not appoint the nominee of the Prime Minister, he must go? It may be prophesied safely that the Prime Minister would have no difficulty in finding an adequate successor.

There is a third leading case on this topic in which unhappily the resolution of the Lord Chancellor was insufficient to overcome the insistence of his colleagues. Lord Hatherley was 72. He had passed a long life in the " dignified seclusion of Lincoln's Inn " and, justly conscious of his own righteousness, he was perhaps more slow than most people to think himself capable of deviation from the strictest lines of propriety. A recent Statute had authorised the appointment of a salaried member of the Judicial Committee of the Privy Council, requiring that the person appointed should be, or have been, a Judge of the superior Courts of Westminster, or an Indian Chief Justice. Difficulties arose in filling the place.

Sir Robert Collier, the Attorney-General, was by universal consent fit for appointment, had he fulfilled the conditions prescribed by Parliament. The appointment rested with the Prime Minister, and he offered the post to Sir Robert Collier, who himself took the objection that he did not possess the necessary qualification. Mr. Gladstone at once proposed to the Lord Chancellor that the qualification should be supplied by making Sir Robert a Judge of the Common Pleas in a then existing vacancy. This appointment rested with the Lord Chancellor. The Chancellor told Mr. Gladstone that "it would hardly do to place the Attorney-General on the Common Law Bench and then promote him"; yet in an evil hour he gave way. Sir Robert Collier was made a Judge of the Common Pleas; he sat in Court for two days in borrowed robes, and then took his seat as a salaried member of the Judicial Committee.

There followed "the great colliery explosion" which, though for the moment it did not blow the Government from their seats, was at least a contributory cause to their defeat in 1874. For the moment the Government had to face, not only a storm of criticism from outside, but a formal vote of censure in both Houses. It is noteworthy that they met it in each House by an amendment to resolve that "this House finds no just cause for a Parliamentary censure on the conduct of the Government in the recent appointment of Sir Robert Collier," and, that amendment being moved, the Government escaped defeat by a majority of 1 in the House of Lords

IV. and a majority of 27 in the Commons. It is still more noteworthy to observe the attitude of the lay mind to the question as expressed both privately and publicly. In both Houses the Government case was mainly argued upon the fitness of Sir Robert Collier for membership of the Judicial Committee, which no one disputed. In the Commons, the Attorney-General (Sir Roundell Palmer) appeared to rest his case partly on Sir Robert Collier's fitness, partly on the "unsullied integrity and unquestionable public virtue" of Hatherley, which were also not in dispute, and partly on the curious ground that the Government did not know it was wrong, and that "the sole motive of the Government was to fill up this judicial office honestly and sincerely, and whether they made a mistake or not they believed that they were right in acting in such a manner that the object of the Act might be accomplished." Among laymen, Lord Granville wrote to Mr. Gladstone, "sufficient attention was perhaps not given to the technical point, for technical it only is."

The true characteristic of the whole incident was that the point was not technical but substantial, and, apart from the pleas *ad misericordiam* put forward by Sir Roundell Palmer, there was in truth no substantial defence for the Government's action. The appointment was "legal," that is to say, it was in accordance with the letter of the law, and there was no process by which it could successfully be impeached; but it was, as Lord Westbury described it, "a fraudulent exercise of a power"; as Lord

Cairns said, "the spirit of the Statute had been palpably violated"; and the only lawyer of reputation who was prepared to support Lord Hatherley in the House of Lords, Lord Romilly, found himself in the somewhat humiliating predicament of seeing that the defence put forward by him was expressly abandoned by the Attorney-General in the House of Commons four days later.

The whole incident was in the highest degree discreditable to the Government. To any man whose character was less firmly rooted than that of Lord Hatherley, it would have been destructive. Whether the Government knew that they were doing right or not, it must be remembered against him that at an early stage of the transaction he had said that "it would hardly do." Lord Chancellors of the future, even if they possess less eminent personal virtue, will be well advised with this awful example before them in resisting similar suggestions from Prime Ministers as subtle as Mr. Gladstone, or from leaders of the House so persuasive as Lord Granville. But in truth laymen are far more technical than lawyers and far more ready to describe matters of substance as technicalities. I can feel a prophetic sympathy for a Minister of Justice, devoid of the defensive armour in which a Lord Chancellor is clothed by the very nature of his office, and assured by his own colleagues that to exact a qualification laid down by Statute is a mere technicality.

There are one or two additional matters on which the present position of the Lord Chancellor offers positive advantages.

IV. The office is of almost immemorial antiquity and carries with it a degree of respect, authority, and distinction which transcends the personality of any one who may at any moment hold it. These advantages must disappear with the transference of its functions to the new Minister. To this objection every one will give as much weight as his own habits of mind suggest, and it is not worth while to discuss it further than by saying that, to uproot an institution so deeply planted in history, and to replant it in new ground, must cause deep anxiety to any student of constitutional development, and must involve consequences and reactions which cannot be foreseen.

Next, the Lord Chancellor (I confine myself for reasons which are obvious to the *ἐν οὐρανῷ παράδειγμα*) is of peculiar value to any Government of which he is a member as a legal adviser. No doubt the fact that the centre of political gravity has shifted to the House of Commons makes the Lord Chancellor's intervention more rare than in the past. But the very rarity of the occasions on which it is required renders it more weighty when it comes. During the last generation, the burden upon the Law Officers in the House of Commons has been enormously increased both upon the political and upon the legal side of their activities. The House of Commons is the most absorbing and the most jealous of assemblies of men. It must be of benefit to a Government to have at hand, when they think fit to take advantage of it, the counsel of another lawyer, who is akin to them in political sympathy, and who has the same interests as they in the issue

of the actual conflict, but who is to some extent removed from the forefront of the battle. IV.

It will be gathered from the foregoing observations that, in my view, the constitution of a Ministry of Justice which is coupled with the divorce from that Minister of the judicial functions exercised by the Lord Chancellor would produce no benefit to the administration of the law, but would rather destroy such machinery as now exists for the accomplishment of the objects which I, in common with many advocates of the change, desire to reach. In a country with a different judicial system such a separation may be beneficial. Probably in an ideal world no one would have constructed the office of Lord Chancellor exactly as it is. Like most of our institutions it is a growth of history, and like all institutions in all countries it is imperfect. There is, however, in legal reform, as in other matters, no short cut to progress. The advances must be slow and painful. I have indicated elsewhere upon what lines progress is necessary and can best and most easily be made. We need greater order and symmetry in the presentation of our law, and for that purpose more codification and consolidation. We need more adequate facilities for the study of the law, and for the education of those who are entering upon its practice. We need more order and symmetry in the machinery of our judicial institutions, and a greater attention to the financial arrangements of justice. These objects cannot be obtained without the support of enlightened professional opinion, nor without the assistance of adequate official machinery. I

IV. gladly recognise how much help the judicial Bench and both branches of the profession have given to me in such efforts as I have been able to make in these directions. I need also further help in my own office—the true Ministry of Justice as I see it. I have no such complaints as those which I have cited from Sir Richard Bethell of any niggardliness on the part of the Treasury in this matter. Still in present circumstances financial obstacles must prevent any rapid development. In recent months two important steps have been taken in this regard. The functions of Accounting Officer for the Royal Courts of Justice have been united with those of my own secretariat, a measure which may appear trivial in itself, but which for the first time fixes the responsibility for the finance of the Courts where rests the responsibility for the adequate performance of the duties for which they are constituted. At the same time arrangements are in progress for the transfer from the Treasury to this office of what has hitherto been the County Courts' Department of the former office, and here again, therefore, the financial and administrative responsibility will shortly be united. It is sometimes said that there are extraneous duties performed by the Lord Chancellor of which he could be relieved and so set free to devote his time more completely to the primary duties of his great office. I doubt whether this is so. There are undoubtedly fields of activity in which there is certain overlapping between the functions of this Department and those of others. The task of gradually evolving a com-

plete and symmetrical system must be a long one. Indeed, in a constitution like our own, which is one of continual growth and development, it is a task which can never wholly be completed. It is not wonderful that there should be those in a thoughtless world who think that it would be best to destroy the whole machine as it exists and start afresh with a new one. It is not by such methods that in the past progress has been made in this country. I have myself made up my mind that the same end must be attained by a more extensive use of the apparatus which has come to us, partly through the mistakes, and partly through the wisdom of our predecessors. IV.

# V

## THE BATTLE OF LE CATEAU

v. THE Battle of Le Cateau, fought on the 26th August 1914, during the retreat of the British Expeditionary Force from Mons, has perversely become one of the most controversial events of the War. No one has ever criticised the valour of the troops engaged—their fighting quality indeed aroused the greatest admiration—nor is it disputed that the breaking-off of the fight and the resumption of the retreat were skilfully conducted. Nor, indeed, is there any question of military principle disputed: the sole question is whether the facts were such that, on the clear principles governing the conduct of a retreat, the stand should have been made.

On the one hand, it is claimed that having regard to the proximity of the enemy and the state of exhaustion of the men, it was impossible to continue the retreat further without a battle. The action was therefore necessary and, moreover, was so successful that not only did it secure the desired result of enabling the left wing of the British Army to continue its retreat, but also it destroyed all chance of the enemy's outflanking movement succeeding. From that day the retreat was practically unmolested.

On the other hand, it is suggested that the men were, though tired, fit to march, and that the enemy were at such a distance that the halt to receive them enabled the Germans to close up, so that there was no real reason for not resuming the march in accordance with orders. The battle was therefore unnecessary, and not only involved the forces engaged in the serious risk of being annihilated, from which the gallantry of the men and the leading of the Divisional and other commanders, with the assistance of the Cavalry and the French troops under Generals Sordet and d'Amade, alone saved them, but also in that event would have pushed the 1st Army Corps, if not indeed the whole French Army, off its line of retreat and placed all the Allied Forces in France in danger of destruction. These consequences were indeed averted, but it is nevertheless alleged that as the left wing on that day suffered 14,000 casualties and lost 80 guns while enabling the enemy to close up his columns, all hope of making an effective stand north of the Marne was destroyed, and the effects of the losses were felt not only during the retreat but also during the Battle of the Marne, and indeed until the close of the early stages of the Battle of the Aisne. Furthermore, it is stated that these risks were run and these serious consequences incurred in spite of timely warning given to General Smith-Dorrien, who thus, by acting upon an incorrect appreciation of the situation, fought a battle which was as unnecessary as it was hazardous.

It would be presumptuous of one who is not

v. a soldier, nor possessed of special military knowledge or information, to criticise or pronounce upon nice questions of military principles. The issues raised are really questions of fact, and as a layman, not unaccustomed to the task of examining and weighing evidence, I propose to discuss the relevant issues of fact with the object of assisting other laymen to whom, as Englishmen, a controversy such as this is still of interest.

There is little information to be obtained from the published German accounts of the War. No real version of this battle from the German point of view has been published. This fact is in itself significant, for the Germans have shown themselves eager to announce their successes and prompt to explain away any failure that can be coloured from their point of view. Le Cateau, it would seem, is a battle which cannot be explained, and the German authorities have been content to pass the action by with as little mention as possible. Still, General von Kluck has, in his book *The March on Paris in 1914*, published an account of his doings during the German advance, which serves to fix the number of Germans opposed to the British, and their position at the dates in question. His account of the actual battle is carefully edited and remarkable for its omissions, but still gives information as to his knowledge and movements on that day.

On our side there have been a number of accounts, not all of them in agreement. Lord French's book "*1914*" must be taken as the main authority, not only because of his position and the weight of his knowledge and experience,

but also because it is a reasoned statement of the causes which have led him to retract in large measure the eulogies which he bestowed upon General Smith-Dorrien in his first despatch of 7th September 1914. v.

In order to appreciate the circumstances in which the Battle of Le Cateau was fought, it is essential to ascertain the general course of events which preceded and led up to the events of the 26th August. The Expeditionary Force, which had landed in France soon after the Declaration of War, consisted at first of two Army Corps. Field-Marshal Sir John French was in command, having under him Sir Douglas Haig in command of the 1st Army Corps (1st and 2nd Divisions), and Sir James Grierson in command of the 2nd Army Corps (3rd and 5th Divisions), together with General Allenby who commanded the Cavalry Division. Other forces were also landed and a 3rd Army Corps was in process of formation. Sir James Grierson died suddenly before the Force was engaged, and was succeeded by Sir Horace Smith-Dorrien.

The instructions given by the late Lord Kitchener to Sir John French contain the following relevant passages :

" The special motive of the Force under your command is to support and co-operate with the French Army against our common enemies. The peculiar task laid upon you is to assist the French Government in preventing or repelling the invasion by Germany of French and Belgian territory, and eventually to restore the neutrality of Belgium, on behalf of which, as guaranteed by

v. treaty, Belgium has appealed to the French and to ourselves.

"These are the reasons which have induced His Majesty's Government to declare war, and these reasons constitute the primary objective you have before you."

Then, after stating the place of assembly and instructing him to discuss matters with General Joffre, the instructions proceed: "It must be recognised from the outset that the numerical strength of the British Force and its contingent reinforcement is strictly limited, and with this consideration kept steadily in view it will be obvious that the greatest care must be exercised towards a minimum of losses and wastage.

"Therefore, while every effort must be made to coincide most sympathetically with the plans and wishes of our ally, the gravest consideration will devolve upon you as to participation in forward movements where large bodies of French troops are not engaged and where your Force will be unduly exposed to attack. . . .

"In minor operations you should be careful that your subordinates understand that risk of serious losses should only be taken where such risk is authoritatively considered to be commensurate with the object in view."

On the 22nd August 1914 the British Army had advanced and were assembled along the line of the Canal which runs from Condé to Mons. This Canal forms a salient to the north of Mons, and the line held had therefore a corresponding salient, conveniently called the Obourg salient, from a small village of that name a little to the

N.E. of Mons. In Condé itself was a French Territorial Division, and next to it was posted the 19th (British) Brigade, which did not form part of either Army Corps. Neither this French Division nor this Brigade came appreciably into action during the Battle of Mons. On the right of the 19th Brigade was the 2nd Army Corps, occupying a line of some 21 miles along the Canal past Mons to Obourg and thence south to the village of Givry, whence the line was continued by the 1st Army Corps for a distance of some 6 or 7 miles to Peissant, a village in Belgium, a little to the N.E. of the fortress of Maubeuge. The 5th Cavalry Brigade was at Binche, in front of the 1st Army Corps, and the Cavalry Division was away on the left flank of the Army.

The position had been taken up as a convenient jumping-off ground for our troops in an advance to be made in conjunction with the French Armies to our right. The 1st Army Corps right should have linked up with the 5th French Army, but on the morning of the 22nd Field-Marshal French, during an unsuccessful attempt to see General Lanrezac, who commanded that army, says he found it in retirement with its left flank at Trélon, some 28 miles S.E. of Mons, and about 18 miles from our right flank. Our Intelligence Staff on the 22nd August estimated that three German Army Corps were advancing against our forces, the most westerly of the German Corps being reported to be at Ath. Lord French came to the conclusion that the Germans intended to make a great turning movement round the British left flank.

v. In this state of affairs General Lanrezac requested that the British should make an attack on the flank of the German forces who were pressing back his Army. Lord French refused, but agreed to hold on to his position for twenty-four hours. As he has explained, this position was a mere jumping-off point for a projected advance. He does not say what advantage would be gained by his remaining there, but presumably the presence of our Army there would operate as a menace to the flank and rear of the German 2nd Army, but it certainly also exposed our forces to an attack with both flanks in the air. Lord French's acquiescence in this grave risk has hardly at present been sufficiently justified.

The German 1st Army, under von Kluck, does not appear, happily for us, to have had any precise information as to the position of the British troops. He came up against our position early on the 23rd August 1914. The attack was at first directed against the Obourg salient, the weakest point, and one which involved the whole of the 2nd Army Corps. The Germans engaged consisted of three Army Corps and two Cavalry Divisions. Lord French was alive to the danger of the salient, and had given orders for taking up a safer line S.W. of Mons if it were seriously attacked. The Germans were bound to make some progress, but in spite of their enormous losses they were unable to obtain a decisive result, and at the end of the day the British troops engaged were holding a position about 12 miles long and about 3 miles behind their

original line. At one stage indeed the Germans just reached Frameries, between the 3rd and 5th Divisions, but the situation was quickly restored. With this exception the 1st Corps was only subjected to artillery attack. The 2nd Corps, on the other hand, suffered 1571 casualties.

Both Corps were ready to renew the fight on the 24th, but before the end of the 23rd the French authorities sent word that at least three German Army Corps were facing us, and that another was manœuvring from the direction of Tournai with the object of outflanking our troops. The right flank had been in the air all day, and now the left flank was menaced. Lord French says that he therefore determined to retreat, but does not precisely state at what time he came to this decision. It would, however, appear that he did so after a conference at Le Cateau, which began about 11 P.M. on the 23rd and was concluded about 1 A.M. on the 24th. Orders to the units to this effect thereupon became necessary. Were they given?

The 1st Corps retreated first and reached its position early on the morning of the 24th. The first unit of the 2nd Corps to move was the 8th Brigade. The orders for this were issued at 6.30 A.M. on the 24th August. Lord French in his book states that the 1st Corps covered the retirement of the 2nd Corps, but there is ground for believing that his recollection has very curiously transposed the two Corps, for in commending the "8th Brigade under Davies" he says that it formed part of the 2nd Division. It was, in fact, part of the 3rd Division in the

v. 2nd Corps, and was commanded by General Doran. General Davies was in command of a brigade in the 1st Army Corps, but it is certain that it was the 8th Brigade which won the admiration of Lord French. This belief is supported by another equally surprising example of transposition, for, in mentioning in his book some confusion caused by the 3rd Division crossing the rear of the 5th Division, he says that it was the 5th that crossed the 3rd. This movement was effected for two reasons, one because the 5th Division was then heavily engaged, and the 3rd Division, by being withdrawn across its rear to a position on the exposed, or west, flank, would leave a gap between itself and Bavai for the hard-pressed 5th Division to retire and, at the same time, would give more room to the 1st Corps, which was moving in a S.W. direction so as to avoid the fortress of Maubeuge. This crossing has much more sensibly been commended for the very reason that these two objects were attained with the minimum of effort. The 2nd Corps retired fighting during the whole of the 24th August, and its casualties for the two days (excluding the 2nd Suffolks, whose casualties were reckoned with those they sustained at Le Cateau) amounted to 3784. The figures for the 1st Corps were 145, and for the Cavalry 258.

The retreat was resumed on the 25th August, but, for some reason which is not clear, the entire movement was not completed. Lord French states that his intention was to retire to a position at Le Cateau, but during the day the two Corps, whose commanders had been supporting

each other, became separated by the Forest of Mormal, so that at the close of the day there was a gap of about 8 miles between them. The 2nd Corps was on the Le Cateau position at night—it will be an important issue exactly when they occupied it—but the 1st Corps had its left flank at Landrecies. During the night of the 25th the 1st Corps was attacked at Landrecies and Maroilles, but repulsed the Germans with heavy losses, and was able to resume its march next day in accordance with orders. It was therefore unable to take any part in the fighting at Le Cateau. V.

It becomes necessary to state with care and precision the circumstances in which the 2nd Corps occupied its position at the close of the 25th August. Lord French in his book gives this version: "The retreat had been resumed at daybreak, and at 6 P.M. all the troops of the 2nd Corps were on the Le Cateau line, except McCracken's Brigade, which had been obliged to stand and fight at Solesmes." General McCracken was specially promoted to Major-General for his services on this occasion. "This Brigade," says Lord French, "did not reach the position until 10 or 11 P.M. on the 25th, and the men were done up." He adds that in the evening of the 25th he visited several units, and, though tired, they had not struck him as being worn out. The 5th Division had secured several hours' rest, and so had the 8th and 9th Brigades of the 3rd Division. The remaining brigade of that division (the 7th, McCracken's) had only just arrived in cantonments at 10 or 11 P.M. (a statement which times

V. the visit as later than 11 P.M.), but could in such an emergency have marched at dawn.

It is obvious that if this accurately represents the real state of affairs, this Corps would have been able to make a very early start on the next morning; but it would appear from the terms of Lord French's statements that he relies upon a memory which is somewhat fallible rather than upon official records. He had many anxious days and great and novel responsibilities during the five years that elapsed between these events and his writing, and he would, it is supposed, be slow to claim that his unaided memory should be taken as decisive upon a matter which, after all, only formed a minor part of the tremendous problems which called for his attention.

There are certain reliable facts which do indeed tend to prove that his memory has misled him upon this very material point. It could hardly have proved impossible for the 1st Corps, which was almost unopposed, to have attained its objective if the 2nd Corps, which had a longer distance to cover and had to fight as well, had reached its position so early. Indeed, such a circumstance would cast an undeserved slur on the commander and men of the 1st Corps, which has never yet been suggested, even by the most irresponsible critic. Official contemporary documents give the following information: The head of the 5th Division reached Le Cateau at 3 P.M. and its rear after dark (as sunset was about 7, darkness would occur about 8 P.M.). The Division had to take up its position and the men had then to entrench. The 28th Brigade R.F.A.,

which had been on rearguard, reached its position at 11.30 P.M., and two sections of the 5th D.A.C. only reached Reumont on the morning of the 26th. The main columns of the 3rd Division reached their positions about 6.30 P.M., and the rearguard shortly before midnight, except the 2nd Royal Irish Rifles and part of the South Lancs. and the 41st R.F.A., who were cut off by fugitives, and did not reach Maurois until 4 A.M. on the 26th, and rejoined their Division about 8 A.M. on that day. This Division also had to entrench. It may be remarked that the crowds of unfortunate refugees, fleeing before the enemy, considerably hampered the retirement of the troops during the greater part of the retreat. The 4th Division did not form part of the troops who fought at Mons, and was not on the 25th under General Smith-Dorrien's command. On that day it had been sent forward by G.H.Q. towards Briastre with orders to remain out until the 3rd Division, the Cavalry Division, and the 19th Brigade (whose retirement it was covering) were all through. Major-General Snow, who commanded this Division and also the 19th Brigade, reported that his Division did not get on to its position until about daylight on the 26th August.

It is a very moderate deduction from the facts above set forth, that none of these troops could have been sufficiently rested so as to enable them to march at daybreak on the 26th August.

The next issue is as to the warning given by General Allenby. He has so far not taken any part in public discussion, and his version is there-

v. fore not available. The suggestion is that he warned General Smith-Dorrien that unless he was prepared to march at daybreak on the 26th he would most probably be pinned down to his position and be unable to get away, and the enemy would probably succeed in surrounding him. Nevertheless, General Smith-Dorrien deter mined to fight.

If, as appears from the facts given above, it was a practical impossibility to move at daybreak, General Smith-Dorrien, having regard to the nearness of the enemy and the latter's plans for the 26th, had no choice at all. The dispositions of the enemy's forces on the night of the 25th August were such that General Allenby could not conceivably be ignorant of them, especially as the troops under his command had been in contact with the enemy all through the retreat. It is more probable that a second version, which is current, is the correct one, viz. that General Allenby was of opinion that unless the troops could march *before* daylight it would be impossible to extricate them, *i.e.* they would have to stand and fight. This version does unquestionably represent the true position with regard to the advancing enemy. It was not a question of marching at daybreak. At that time the enemy was upon them. The question was whether the men could march in the dark, a decision which would involve for the majority no rest at all, and for over one-third a continuous march which had then already lasted twenty hours. General Allenby was present at the conference about 2 A.M. on the 26th, held by

General Smith-Dorrien, when he determined to fight, as also were Major-General Hubert Hamilton, Brigadier-General Forestier Walker, and Col. John Vaughan. At this moment the 3rd Division had not completely occupied its position, and the 4th Division was still out.

It is not unimportant to note that once this decision was taken, both General Allenby and Major-General Snow agreed to act under General Smith-Dorrien's orders. It is hardly probable that if in their opinion he was about to incur the risk of the almost certain destruction of two Divisions they would agree to throw into the loss another Infantry Division and Brigade and also the only Cavalry Division which the Expeditionary Force possessed.

A further vital question is: Where was the enemy? Lord French says that all reports up to midnight on the 25th concur in saying that Cambrai was still in the possession of the French. This statement is correct. The last French troops left Cambrai at 2.15 P.M. on the 26th August. He adds that the position there was not then seriously threatened, and that whilst there were clear signs of the outflanking movements in progress, no considerable bodies of the enemy had yet crossed the line Valenciennes—Douai, and that after their repulse at Solesmes the enemy was not in strength south of the line Valenciennes — Maubeuge. This amounts to a definite and confident assertion that there was no important enemy force within 20 miles of the Le Cateau position, and is open to the comment that if that were so, then little risk would be

v. involved in staying there, as there would be time to rest the troops before resuming the retreat.

It is here that the evidence of the enemy is available and is decisive. von Kluck gives the position of his troops at the close of the 25th August as follows :

2nd Corps and Cavalry Corps : Bouchain—Saulzoir.
4th Corps : Solesmes—Bousies—Landrecies.
3rd Corps : Maroilles—Aulnoye.
9th Corps : Pont sur Sambre—Bavai—Havay, in a semicircle south, west, and north of Maubeuge.
4th Reserve Corps : Valenciennes.

He adds that the Corps fronts faced S.W. and S.E., meeting at Landrecies.

Lord French's statement would only apply, therefore, to the 4th Reserve Corps, which was advancing to join the other Corps and parts of the 9th Corps, which were then masking Maubeuge. The bulk of the enemy were in force along the line Bouchain—Solesmes—Landrecies, and were therefore miles nearer us than Lord French thought, and within easy striking distance.

The German 1st Army H.Q. were as near as Haussy, a village only 2 miles north of Solesmes. It had intended to take up quarters at the latter town, but found it impossible to do so owing to the fighting which was still going on in the semi-darkness.

The German 1st Army was therefore in immediate touch with our troops. The 4th German Corps and two Cavalry Corps were on their front; within 8 miles of their left were the heads of column of the 2nd Army Corps; within 6 miles of their right was a division of the 3rd Army

Corps, and two more Corps were within a few hours' march. V.

von Kluck's orders for the 26th August, which were issued at 11.50 P.M. on the 25th, would have brought the Germans on to both flanks and the rear of the British forces. General Hamilton had reported that his men would be unable to march before 9 A.M., but the German attack was in progress soon after the dawn, and by 9 o'clock the 4th Army Corps had been held up by the trenches, which had been hastily dug but which were so well defended that the Germans thought the position had been strongly prepared for defence. The orders which von Kluck gave for an outflanking attack on both wings of the British position show that he had correctly ascertained their flanks and was ready to take the obvious offensive. It is true that he has been criticised for mistaking the position on the assumption that his reference to the northern wing and southern flank are to be taken literally, but a reference to the position as marked on his map and to the places he names shows that his intelligence staff was well informed. Our forces consisted of the 2nd Army Corps, the 4th Division, and the 19th Infantry Brigade, together with the Cavalry Division, which was so placed as to lend assistance to both flanks. The 84th French Territorial Division was covering Cambrai but not in touch with our forces, while General Sordet's Cavalry Division, which had spent the night at Aubercheul aux Bois, some 10 miles south of Cambrai, was moving up on the left to render assistance to the left flank.

v. As already mentioned, fighting began soon after dawn, and by 9 o'clock the German 4th Corps was obviously unable to effect their object of carrying the position by frontal attack. The 4th Reserve Corps was accordingly directed to make a flanking attack against our left, while the 3rd Corps was entrusted with a similar duty towards our right. Both of these flanks were in the air, though it is reasonable to suppose that General Smith-Dorrien was expecting the 1st Corps to appear on his right or east flank and therefore regarded that flank as fairly secure, as on the left there was no contact between our men and the French at Cambrai, who were also attacked and forced to retire early in the afternoon. The presence of these troops no doubt instilled caution into the movements of the 4th Reserve Corps, but on the right there were no supporting troops. The German attack developed under the cover of the entire artillery of four, if not indeed of five, Army Corps, but the whole line held, until about 3 o'clock the 5th Division on the right, menaced in flank and rear, was forced to retire, and this movement led to orders for the breaking off of the fight. The retreat began again at 3.30 P.M., and all the troops were away by about 6 P.M. As the left wing was retiring, General Sordet's artillery came into action farther to the west and thus rendered very welcome service to the retiring troops. The movement was practically unmolested, though unfortunately as some units did not receive the order to retire a number of our men were taken prisoner. So well had our troops fought that von Kluck

imagined that he was opposed by the whole Expeditionary Force, and he was in fact so badly hammered that immediate pursuit was out of the question. The German general's account of the battle is carefully edited and clearly wrong in certain of its details, but the time and contents of the operation orders for the 27th August leaves little doubt as to the effect of the day on the Germans. The orders were issued at 9.15 P.M., when all our men had been three hours on the march, and they did not order any advance before 2 A.M. on the 27th; while the statement that the line Esnes—Caudry—Reumont was to be passed at 5 A.M. shows that the advance was not resumed by the main force of the Germans until twelve hours had been gained. More than that, H.Q. remained stationary at Solesmes, and the positions shown on the map for the close of the 27th give an extremely short advance, which eloquently proclaims that their losses had for the time paralysed their power of movement. For five days they were out of touch of the British Forces, and during the remaining period of the retreat our Cavalry, which had seized the opportunity of the battle to reunite its scattered squadrons, was easily able to deal with any Germans who were encountered. On the 28th August, we occupied the line Noyon—La Fère, and the map shows that the enemy did not occupy this line until the close of the 31st August.

Results such as this are the very aim and object of a delaying action by retreating forces: they were the results intended by the Commanding Officer. If success is the test of military

v. operations, the offer of battle was abundantly justified.

There is a point which may trouble the layman but does not influence the soldiers, who have expressed their views. The order was to continue the retreat, but that order was disobeyed. Lord French deals with it by the express statement that the commander of the troops engaged is in the best position to judge of what his men can do. The reason why such an order can properly be disobeyed in certain circumstances is that the Commander-in-Chief issues them in advance on the information that he has. Events move very quickly, and the officer charged with the duty of carrying out the order may find that it is impossible of execution or that obedience will entail disaster. In such a case, all military authorities agree that it is not only his right but indeed his duty not to carry out the order, but to take such measures as will cope with the existing situation. This principle is laid down in the Field Service Regulations, Part 1, Section 12, Par. 13, where the principle and its conditions are clearly stated. In fact, where an occasion arises for the application of this principle the subordinate commander will be held responsible for his failure to apply it.

Lord French lays stress on the assistance given by the Cavalry and the French troops. Nothing but praise can be given to General Allenby for his decision to remain, and for the support which he gave, but the fact that the casualties of the Cavalry during the battle amounted to no more than five proves that they were hardly engaged

at all. The parts played by the French troops under General Sordet and d'Amade have already been stated. Their services were clearly of great importance and deserve proper recognition, but the French troops were neither so numerous nor so placed that they could have enabled our troops to extricate themselves if they had not been able to do so as the result of their own exertions. The despatch of 7th September 1914 ignored General Sordet's services. The statement in the book exaggerates them. The plain truth is that he was asked to assist, and promptly and loyally rendered all the assistance in his power. He is entitled to every expression of thanks, but it is not necessary to overestimate the merit of his action, especially when the only consequence is to depreciate unduly the skill and judgment of our own general.

One last point: it may be objected that though great results were attained, it was at the cost of too great losses. The statement has been made that 14,000 casualties were suffered and 80 guns lost, and that by the 28th August the losses were 15,000 officers and men and 80 guns. These round numbers are obviously not meant to be taken as exact—it is plain enough that Le Cateau cannot have been responsible for all the losses but 1000. The figures for Le Cateau are 7687 casualties and 38 guns lost. The total casualties for August 1914 were 14,409. These are no doubt heavy, but were not excessive. The troops were a force in being on the 27th August. They completed the retreat, they took a full share in the victory of the Marne and the

v. Battle of the Aisne, and when the time came to move to Flanders they were among the first to come into action. Their Commanding Officer was at the end of 1914 selected to command one of the two armies which were then formed.

The decision to fight which led to the Battle of Le Cateau was a serious responsibility, but no British soldier who is faced with the alternative of retreating and being dispersed or of fighting could possibly hesitate. The risk was great, but the infamy of shirking responsibility would have been eternal.

In his contemporary dispatch Lord French thus recorded his impressions at the time :

"I cannot close the brief account of this glorious stand of British troops without putting on record my deep appreciation of the valuable services rendered by General Sir Horace Smith-Dorrien.

"I say without hesitation that the saving of the left wing of the Army on the morning of the 26th August could never have been accomplished unless a commander of rare and unusual coolness, intrepidity, and determination had been present to personally conduct the operations."

The censures which Lord French has now thought it right to pass upon General Smith-Dorrien in his book are not likely to be accepted by the historian of these critical days. The Field-Marshal would, indeed, have acted more wisely, as well as more generously, if he had adhered to the tribute which I have quoted above—in itself in no way excessive—to an accomplished and imperturbable soldier.

# VI

## CODIFICATION AND CONSOLIDATION



In a civilised state, next to the need that the laws should be just, sound, and uniform, comes the need that they should be simple and intelligible. The English mind, impatient of theory, suspicious of symmetry, fond of short-cuts and rule-of-thumb methods, has, rather by secretion than design, produced the laws most appropriate to its circumstances and to its own methods of working. The amazing genius of the English for improvisation was never put to better use than when, during the eighteenth century, the doctrines of equity grew under the hand of Hardwicke, and the great instrument of the common law was shaped and perfected by Mansfield, or when a little later the principles of the law of prize and admiralty were laid down by Stowell. But improvisation and the habits of mind best suited to it bring with them their own peculiar penalties. These great masters and their followers proceeded on their task heedless of the mass of worn-out forms, which they scarcely felt as an encumbrance, until, when the law reformers of the nineteenth century came to view the scene, whether of substantive law or of procedure,

VI. they found it a vast and tangled wilderness through which succeeding generations have been obliged painfully to hew their way, and from which the present generation has not wholly emerged.

About the time when Lord Mansfield sat in Westminster Hall and Sir William Blackstone was engaged in explaining the supreme excellence of the English legal system, the delicate and dwarfish son of a London attorney was called to the Bar by Lincoln's Inn. Jeremy Bentham attended Blackstone's lectures at Oxford, and conceived an antipathy both for the man and for his writings, and particularly for the "universal inaccuracy and confusion which seemed to my apprehension to pervade the whole." At first he took Mansfield for the god of his idolatry; but he lived to write that "nothing but the greatest integrity in a tribunal can prevent the judges from making an unwritten law a continual instrument of favour and corruption." No reformer ever was more visionary, no controversialist more acrid, no philosopher more diffuse, no lawyer less competent to deal with the ordinary practical transactions of the Courts. Yet it has been written of him with truth that "every law book, every statute, the course of every action, bear testimony to his influence." [1] And the greatest of his disciples, Sir James Stephen, says of his writings that they "have had a degree of practical influence upon the legislation of his own and various other countries

[1] Sir John Macdonell in *Dictionary of National Biography*, *s.v.* Bentham.

comparable only to those of Adam Smith and his successors upon commerce."

With equal truth it has been written that he "has furnished many most valuable hints and amendments which have been or will be adopted into English law. But he has neither replaced nor even reconstructed English law as a whole."[1]

To Bentham's lucid vision, however, there seemed no difficulty in constructing a cure for the chaos of the English law—"a complete digest: such is the first rule. Whatever is not in the code of laws, ought not to be law."

The words in which he described his self-appointed task are familiar, but they illustrate so clearly both the excellencies and the deficiencies of his mind, and are in themselves so instinct with his whimsical humour, that it is impossible to avoid their citation.

"The laws being given, why has the legislature prepared them? The answer is simple, as it is incontestable: 'With the intention that each disposition should be present to the minds of all those who are interested in the knowledge of it, at the moment in which this knowledge may furnish them with motives for regulating their conduct.' For this purpose it is necessary—(1) That the code be prepared altogether in a style intelligible to the commonest understanding. (2) That every one may consult and find the law of which he stands in need, in the least possible time. (3) That for this purpose the subjects be detached from one another, in such manner that

[1] F. C. Montague, Introduction to Bentham's *Fragments on Government*, p. 43.

VI. each condition may find that which belongs to itself, separated from that which belongs to another.

"'Citizen,' says the legislator, 'what is your condition? Are you a father?' Open the chapter 'Of Fathers.' 'Are you an agriculturist?' Consult the chapter 'Of Agriculturists.'

"This rule is both simple but satisfying. Once announced, it is comprehended: it cannot be forgotten. All legislators ought to follow so natural a method, says Philosophy—Not one of them has ever dreamt of it, replies the lawyer."

Two comments may be made upon this passage: the first, that the task is impossible; the second, that, if possible, it would be useless.

As to its possibility, compare the observations of Napoleon upon the construction of the code which bears his name. "I first thought that it would be possible to reduce laws to simple geometrical demonstrations, so that whoever could read and tie two ideas together would be capable of pronouncing on them; but I almost immediately convinced myself that this was an absurd idea.

"I often perceived that over-simplicity in legislation was the enemy of precision. It is impossible to make laws extremely simple without cutting the knot oftener than you untie it, and without leaving much to incertitude and arbitrariness."

These are indeed the words of one who despised idealogues, but of one who claimed that his glory consisted, not in having won forty

battles, but in the civil code and the deliberations of his Council of State.

The French code in particular has been the subject of criticism from two distinct schools of thought. But, as a modern writer has observed, while these criticisms are no doubt largely true, "some of them would be equally applicable to any code framed at any time. The most elaborate system of legal casuistry is poor beside the inexhaustible power of life to produce new combinations; and no code can be more than a legal alphabet. It is doubtful whether the civil code has reduced the bulk of French case-law, or materially lightened the labours of French judges. On the other hand, it has diffused the knowledge of law and made it comparatively easy for the ordinary Frenchman to become acquainted with the leading principles which govern the law of his own country." [1]

This is far from Bentham's conception. "It is not sufficient," he says, "that a code of laws has been well digested with regard to its extent; it ought also to be complete. For the attainment of this object, it is necessary at once to embrace the whole of legislation—and this principal object has never yet been attempted. . . .

"The collection of the laws made upon this plan would be vast, but this is no reason for omitting anything. Whether a law be written or unwritten, it is not less necessary that it should be known. To shut one's eyes to the mass of the burden we are obliged to bear, is not a means of lightening its weight. Besides, what part

[1] H. A. L. Fisher in *Cambridge Modern History*, vol. ix. page 160.

VI.

ought to be excluded ? To what obligation ought the citizens to be subjected without their knowledge ? The laws are a snare for those who are ignorant of them. This ignorance would be one of the greatest crimes of governments, if it were not the effect of their incapacity and unfitness. Caligula suspended the table of his laws upon lofty columns, that he might render the knowledge of them difficult. How numerous are the countries in which these matters are still worse ! The laws are not even upon tables;—they are not even written. That is done from indolence which the Roman emperor did from tyranny."

As to the usefulness of such a task, Bentham's conception of a code of laws, so drawn as to be intelligible to fathers, to agriculturists, and almost to children, and so clear and unambiguous as to obviate the necessity of the employment of professional advice, has long been abandoned as an impracticable ideal. Sir James Stephen, in relation to codification in India, says that the object to be aimed at should be that " of providing a body of law for the government of the country so expressed that it might readily be understood and administered both by English and by native lawyers themselves without extrinsic help from English law libraries." In the case of England it seems to be a question of providing a body of law so expressed that it may readily be understood by those most affected by it. To the uneducated the form of the law, as apart from its substance, is a matter of comparative indifference. The simple command of the decalogue is sufficient to inform us that we must not murder

or steal, but it is desirable, when we do steal or are accused of stealing, that the accusation should be made against us in such a form that we can readily understand what the accusation is, and what the punishment. On the other hand, the protection of society in the complexities of a modern state demands a certain complexity of legislation upon the subject of larceny and fraud; the problems arising from an unlawful killing cannot be considered without refinements strange to the lay mind. We cannot hope to express it without some technicality or the use of terms of art. Our hope must be that the law shall be designed and administered by persons who prefer simplicity, where it may be obtained, rather than complexity and technicality; if so, the proper result will be obtained.

It by no means follows that it is less desirable to codify the criminal than the civil law. But the purpose of such a codification cannot be that for which Bentham sought. "Codification," says Sir James FitzJames Stephen,[1] "means merely the reduction of the existing law to an orderly written system, freed from the needless technicalities, obscurities, and other defects which the experience of its administration has disclosed." But people are not daily engaged in the work of homicide or theft, as they are in underwriting or banking. Nor fortunately in an ordered society are they constantly exposed to murderous assaults or pillage. The 7th edition of *Russell on Crime* devotes 173 pages to the discussion of the law of homicide and another 27 to the discussion of the

[1] *History of the Criminal Law*, vol. iii. p. 350.

VI. law of conspiracy either to commit or attempt murder and of the law on the attempt to commit murder. The common law definitions of murder and manslaughter as set out by Sir James Stephen in Article 224 of his *Digest* (6th edition, 1904) contains 89 words and requires for its apprehension the study of Articles 245, 246, and 247 on the subject of provocation, which contain 211 words. Furthermore, it may well happen that, upon an indictment for murder, it is necessary also to consider the whole doctrine of the law with reference to the relation of insanity and criminal responsibility; and so recently as last year the House of Lords, after a hearing extending over four days, concurred in an opinion expressed by myself, which in itself occupies 17 pages of the Law Reports, upon the relation between the legal doctrines applicable to a case where the man committing the act of violence was alleged to be under the influence of drink (Rex *v.* Beard, 1920, A.C. 479). Clear and succinct as are Sir James Stephen's definitions, it is obvious that such a code, useful as it undoubtedly would be to the practitioner, would serve no practical purpose in the hand of him who does not bring to it a mind qualified by legal study.

But where the classes generally affected are well educated and intelligent, a code might and would be useful. It would not, of course, obviate the necessity of taking professional advice in many cases, but it would afford to such a class a means of acquiring a general knowledge of their rights and liabilities, and be a guide to the every-day practice which is not readily obtainable while

the law remains in its present amorphous condition.

Before, however, I approach the question in what circumstances a code may most usefully be constructed, I must clear away a confusion which sometimes arises from the use of the terms " codification " and " consolidation." The terms are often used interchangeably as if they connoted the same process. I will therefore, at the outset, state the meanings attached to them in this paper and in modern instructed usage.

By consolidation is meant the combination in a single measure of statutory enactments relating to the same subject-matter scattered over different Acts.

By codification is meant the process of reducing to a statutory form the previously unwritten rules of common law, though, where the common law has been augmented or supplemented by Statute law, that Statute law will in its turn be reproduced by and embodied in the code, and to that extent the process involves consolidation.

Consolidation does not make any fundamental change in the form of the law. The law consolidated was embodied in Statutes, and after consolidation it still remains Statute law. Sometimes, where a particular phrase in the Acts consolidated has received judicial interpretation, the phraseology is altered so that occasionally effect is given to case law by consolidation. Consolidation is a comparatively simple process. The draftsman of a consolidation Bill need not be an expert in the portion of the law consolidated.

VI. Extreme care and accuracy, a competent knowledge of the rules of construction, and of the effect of other legislation of more recent date on the enactment to be consolidated, and a power of lucid and orderly arrangement, are the chief requisites. Codification, on the other hand, is a matter of extreme difficulty, and cannot be attempted by any one except an expert in the branch of the law to be codified, nor indeed without the co-operation of numerous experts. It is therefore a slow business and entails very considerable expense.

Any particular measure, either of consolidation or of codification, can be or attempt to be an exact reproduction of the existing law; or it can simultaneously effect amendments in the law reproduced. In either event, it must be embodied in a Bill which has to pass through both Houses of Parliament. And from the Parliamentary point of view it is essential for its easy passage that the measure, as introduced, should exactly reproduce the existing law which it professes to embody, even to the extent of reproducing ambiguous language and doubts which may have arisen upon its construction. Such a Bill receives by the custom of Parliament special treatment. It is examined by a Committee of both Houses, who satisfy themselves, by the evidence of the draftsman and of the Parliamentary Counsel, that the Bill is that which it purports to be—that is, an exact reproduction of the existing law, and the further progress of the Bill is thus facilitated by the assurance given that no new points of controversy arise. Frequently, however, the Com-

mittee recommend to Parliament the solution of ambiguities or doubts, and point out the way in which this may be accomplished, and the necessary amendments are made in the House itself; or an amending Bill clearing away the difficulty may be introduced and passed *pari passu* with the measure for consolidation or codification, and if it passes through both Houses its provisions may be embodied in the larger measure before it becomes law.

The task, therefore, which is set to him who would consolidate or codify is so modest that it is unlikely to generate any great enthusiasm. To the root and branch reformer it is and always has been distasteful. The work must depend for its success in the future, as it has done in the past, on the slow and laborious efforts of men who, being convinced of the importance of the subject, are prepared to lay foundations or to build, perhaps, one more story for the edifice, only too often without any hope that they may live to see it fully completed.

Tentative efforts in this direction were made throughout the nineteenth century, very largely under the influence of the warm enthusiasm and the larger hopes with which Bentham was inspired.

Perhaps the first definite landmark in the progress was the passing in 1850 of a short Statute containing eight sections, which, while it continued in operation, was known, from the name of its author, as Brougham's Act. The Bill had a remarkable history, for it passed through all its stages in both Houses without a word being said for or against it, except in the

VI. introductory speech upon its First Reading in the House of Lords. Lord Brougham then referred to its provisions as matters which " might have been considered by Bentham as mock reforms because they were of very small amount, but it did not follow that they were of very small importance." It has, indeed, affected permanently the form of the whole of our Statute law. It required (it seems strange that it should have been necessary to wait until 1850 for such a requirement) that all Acts should be divided into sections and that the " sections shall be deemed to be substantive enactments without any introductory words," and thus swept away the otiose and irritating habit of repeating the enacting formula at the commencement of every section. It made a beginning for a series of statutory definitions, and declared that thenceforth words importing the masculine gender should include the female, and the singular should include the plural, and the plural the singular, and defined the meaning of a few terms which must necessarily occur constantly in Acts of Parliament, and which must thus be defined over and over again in separate Acts or left with their meaning doubtful. By these and some other more technical enactments the Statute set up the beginnings of a dictionary of statutory terms which remained for the guidance of the draftsman for 39 years.

The Acts of Parliament Abbreviation Act was perhaps Brougham's last contribution to the many causes for which he had fought so strenuously, if so fitfully. Eighteen years of life yet remained to him, but his sun was drawing near

to its setting, leaving behind it little but disappointed hopes and the memory of its own brilliance. Even the "odd little sort of garden chair," which his most recent biographer thought might be his most lasting monument, is giving place to the motor car; and Lord Brougham's Act has long since been smothered in the arms of its successor, the Interpretation Act, 1889. VI.

The 'fifties saw but little or no objective result in the work, but in 1852 Bethell became Solicitor-General. The bitter controversies amid which he lived, the wounds which he inflicted with his tongue and pen, and the dramatic incident of his fall have obscured the solid work which he attempted for English jurisprudence. No one was more earnest in his desire to bring order out of chaos and to simplify "the lawless science of the law, that codeless myriad of precedent, that wilderness of single instances." No one was more insistent that "great part . . . of the evil . . . would be removed if we possessed a code or digest—an *Universum Corpus* of English law." Unhappily his career as Chancellor was cut short by circumstances which it is now unnecessary to describe, and it has remained for other men to act upon the renewed impulse which he gave to the movement.

Westbury ceased to be Chancellor in July 1865. In the autumn of 1866, no doubt largely as a result of his initiative, a Royal Commission was issued. Cranworth was Chairman, and the other members of the Commission were Westbury himself, Cairns, Wilde (afterwards Lord Penzance), Robert Lowe (afterwards Lord Sherbrooke), Vice-

VI. Chancellor Page Wood (afterwards Lord Hatherley), Sir George Bowyer, Sir Roundell Palmer (afterwards Lord Selborne), Sir John Shaw Lefevre, Sir Thomas Erskine May (afterwards Lord Farnborough), Mr. W. R. S. Daniels, K.C., Henry Thring (afterwards the first Parliamentary Counsel and Lord Thring), and Mr. F. S. Reilly.

Their Report, dated 13th May 1867, is short and interesting. They say, among other things, "The Statute Law is of great bulk. In the quarto edition in ordinary use, known as Ruffhead's, with its continuations, there are 45 volumes, although (particularly in the earlier period) a large quantity of matter is wholly omitted, or given in an abbreviated form, as having ceased to be in force. The contents of these volumes form one mass without any systematic arrangement, the Acts being placed in merely chronological order, according to the date of enactment, in many cases the same Acts containing provisions on heterogeneous subjects. A very large portion of what now stands printed at length has been repealed, or has expired, or otherwise ceased to be in force. There is no thorough severance of effective from non-effective enactment, nor does there exist in a complete form any authoritative Index, or other guide by the aid of which they may be distinguished. Much, too, contributes to swell the Statute Book which is of a special or local character, and cannot be regarded as belonging to the general Law of England.

"The Judicial Decisions and dicta are dispersed through upwards of 1300 volumes, comprising, as we estimate, nearly 100,000 Cases,

exclusive of about 150 volumes of Irish Reports which deal to a great extent with Law common to England and Ireland. A large proportion of these Cases are of no real value as sources or expositions of Law at the present day. Many of them are obsolete; many have been made useless by subsequent Statutes, by amendment of the Law, repeal of the Statutes on which the Cases were decided, or otherwise; some have been reversed on appeal, or overruled in principle; some are inconsistent with or contradictory to others; many are limited to particular facts or special states of circumstances furnishing no general rule; and many do no more than put a meaning on mere singularities of expression in instruments (as wills, agreements, or local Acts of Parliament), or exhibit the application, in particular instances, of established rules of construction. A considerable number of the Cases are reported many times over, in different publications, and there often exist (especially in earlier times) partial reports of the same Case at different stages, involving much repetition. But all this matter remains encumbering the books of Reports. The Cases are not arranged on any system; and their number receives large yearly accessions, also necessarily destitute of order: so that the volumes constitute (to use the language of one of Your Majesty's Commissioners) 'what can hardly be described, but may be denominated a great chaos of judicial legislation.'

"At present the practitioner, in order to form an opinion on any point of Law not of ordinary occurrence, is usually obliged to search out what

VI. rules of the Common Law, what Statutes, and what Judicial Decisions bear upon the subject, and to endeavour to ascertain their combined effect. If, as frequently happens, the Cases are numerous, this process is long and difficult; yet it must be performed by each practitioner, for himself, when the question arises, and in some cases, after an interval of time, it may have even to be repeated by the same person. Without treatises, which collect and comment on the law relating to particular subjects, it is difficult to conceive how the work of the legal profession and the administration of justice, which greatly depends on it, could be carried on; but, however excellent such separate treatises may be, they do not give the aid and guidance that would be afforded by a complete exposition of the Law in a uniform shape.

"A Digest, correctly framed, and revised from time to time, would go far to remedy the evils we have pointed out. It would bring the mass of the Law within a moderate compass, and it would give order and method to the constituent parts."

On these grounds the Committee reported that a Digest of law was expedient.

They then went on to say that it would be very expensive, and therefore recommended that a portion of the Digest should be undertaken under their superintendence.

The Commissioners were given power by the Government to prepare specimens, and they selected three subjects—Bills of Exchange, Mortgages, and Easements.

Meanwhile Cranworth died, Westbury succeeded him as Chairman, and Sir J. S. Willes and Sir Henry Maine were added to the Commission.

They reported on the 11th May 1870 :

" The gentlemen, whose assistance we have had, have laid before us materials of considerable value, and have enabled us to form conclusions as to the conduct of the entire work.

" But we think it unadvisable to continue any further this mode of proceeding.

" We have found that the examination and revision of these materials with that rigorous care and accuracy which would be requisite before we could lay them before Your Majesty as specimens of a Digest of Law would involve considerable further delay and expense, while on the other hand we have satisfied ourselves that these specimens would have again to be revised, and perhaps recast, when the time arrived for inserting them as portions of a complete and systematic work.

" The experiment, however, has served a useful purpose. It has brought out very clearly the difficulties to be contended with, and the conditions under which the work must be executed.

" We believe that the materials which have thus been collected may be made use of with advantage in the formation of a general Digest of the Law, and we are of opinion that the work of a general Digest, based on a comprehensive plan, and with a uniform method, should be at once undertaken."

They, therefore, recommended that a body of persons, not exceeding three in number, should

VI. be constituted with the duty of executing the Digest as a whole, being provided with the necessary means and assistance, and acting under such directions and control, either of the Committee of the Privy Council or otherwise, as might seem fit.

Willes J. dissented on the ground that the Digest would only be a makeshift for a code, and that " a really well considered code, embodying improvements suggested by a comparison of our own law with those of other countries, might contribute something to a great object, the gradual formation of international mercantile and maritime law."

It does not appear that any immediate step was taken upon this. In July 1868, Lord Cairns had set up the Statute Law Committee, and they " caused to be prepared and published, under their superintendence, a Revised Edition of the Statutes brought down to the year 1878, as well as a digested Index of the whole of the existing Statute Law, with a Chronological Table showing the Statutes for the time being in force."

Meanwhile Lord Westbury's letters and speeches had stimulated interest in the profession upon the subject of law reporting, and while he was still Chancellor the authorised series of Law Reports was organised and started on its career—the main lines of the system being laid down under his advice.

There now comes upon the scene, however, a man who, of all the law reformers of the nineteenth century, combined in the most striking manner vigour, practical knowledge, robust com-

mon sense, and a supreme power of the literary expression of those things which appertain to the study and practice of the law. James FitzJames Stephen was born in 1829, and in 1863 he published his *General View of the Criminal Law of England.* Stephen was " in his first principles an unhesitating disciple of Bentham and Austin." But Bentham was not a practical lawyer and Stephen was. Bentham's writings are as prolix and verbose as any Statute. Stephen's work is expressed clearly and tersely. He possessed to a pre-eminent degree the art of simple and direct narrative combined with that of marshalled and convincing exposition. Thus not only does his Digest of the Criminal Law set out in the smallest space possible the law which it professes to contain, but his treatises are models both of language and of arrangement. They are as entertaining as Macaulay's proverbial novel, and his style rises, when the occasion demands it, to a grave and majestic eloquence.

It is impossible to read the cases set out at the end of the third volume of his *History of the Criminal Law* without seeing that Stephen, unlike most jurists, was deeply interested in the dramatic side of the administration of the criminal law, and, unlike most practical lawyers, was not ashamed to confess it. But beyond this, the chief attraction to him in legal study lay in the close connection between morality and the administration of the criminal law. His considered view on the matter is set out in the *History of the Criminal Law* (vol. iii. p. 367) : " At many times and in many places crime has been far more

VI. active and mischievous than it is at present, but there has never been an age of the world in which so much and such genuine doubt was felt as to the other sanctions on which morality rests. The religious sanction in particular has been immensely weakened, and unlimited licence to every one to think as he pleases on all subjects, and especially on moral and religious subjects, is leading, and will continue to lead, many people to the conclusion that if they do not happen to like morality there is no reason why they should be moral."

This led him to the conclusion that " in such circumstances it seems to be specially necessary for those who do care for morality to make its one unquestionable, indisputable sanction as clear, and strong, and emphatic, as words and acts can make it. A man may disbelieve in God, heaven, and hell, he may care little for mankind, or society, or for the nation to which he belongs—let him at least be plainly told what are the acts which will stamp him with infamy, hold him up to public execration, and bring him to the gallows, the gaol, or the lash."

The sentiments which underlie this passage are not popular in the present day, but recent years have seen an advance greater than Stephen can have at one time hoped for. Some at least of those who in 1908 took up the work where Stephen left it would have considered the reasons given by him as brutal. In the same way a generation softer than Stephen's instituted two reforms for which he had unsuccessfully pleaded during his life—the creation of a Court of Criminal

Appeal and the abrogation of the rule which forbade a prisoner or his wife to give evidence on oath upon his trial. It is characteristic of the man that the first argument which he adduces against the old rule is that it is "highly advantageous to the guilty"; and it is equally characteristic, both of the essential justice of his mind and the extent to which it was capable of being worked upon by the everyday transactions of the Courts, that his next reason is the hardship of the old rule upon innocent men, as proved by the two most interesting examples which he gives on pages 443 and 444 of his first volume.

Such a man, while he apparently never abandoned his admiration for his first master, was quick to diverge from him in the practical application of his principles. He soon saw that "though the English law is unsystematic, ill-arranged, and superficially wanting in scientific accuracy, it does, in fact, represent a body of principles, worked out by the rough common sense of successive generations, and requires only to be tabulated and arranged to become a system of the highest excellence."[1] He became "convinced by experience that Bentham's onslaught upon 'judge-made law' and legal fictions and the 'fee-gathering' system was in great part due to misunderstanding. The law requires to be systemised and made clear rather than to be substantially altered."[2]

Perhaps Bentham might have thought that Stephen's conversion to these views laid him

[1] Leslie Stephen's *Life of Sir James FitzJames Stephen*, p. 209.
[2] *Op. cit.* p. 211.

VI. under the general animadversion which he (Bentham) pronounced against the whole tribe of lawyers. "They love the source of their power, of their reputation, of their fortune; they love unwritten law for the same reason that the Egyptian priest loved hieroglyphics, for the same reason that the priests of all religions have loved their peculiar dogmas and mysteries."

Much as there was of the moral earnestness of the preacher in James FitzJames Stephen, there was little of the priest, still less of the mystic. It must be admitted, however, that he was both a lawyer and a patriot, and in neither capacity would he have been approved as a faithful disciple.

In December 1869, Stephen went to India as Legal Member of Council in succession to Sir Henry Maine. He remained there until 1872. In that short period almost the whole of his energy was given to codification. He drew and passed into law an Act prescribing rules for the Limitation of Suits, an Evidence Act, and a Contract Act, and he revised and caused to be re-enacted, with extensive alterations, the code of criminal procedure. He returned to England with increased experience of the work of codification. In 1874, he published his *Digest of the Law of Evidence*, and in 1877 his *Digest of the Criminal Law*, of which works Sir Courtenay Ilbert has said that they "are, and seem likely to remain, the best guides to those subjects which can be obtained either by the English or the foreign student."

In the following year he completed his Criminal

Code. It was introduced into Parliament by Sir John Holker, Attorney-General, and was referred to Lord Blackburn, Mr. Justice Barry (of the Irish Bench), Mr. Justice (afterwards Lord-Justice) Lush, and Stephen himself "to report thereon and to suggest such alterations and amendments in the existing law as to indictable offences and the procedure relating thereto as may seem desirable and expedient."

The Commission reported in June of the same year, and in the following January Stephen was created a Judge in the room of Sir Anthony Cleasby. The subsequent history of the Code was short and inglorious. That part "which related to procedure," says Sir Courtenay Ilbert, "was introduced as a Government measure in 1882, and was the first subject referred to the Grand Committee on Law which was set up experimentally in that year. After a few sittings, in which small progress was made, the Bill was abandoned. Some of the proposed changes of procedure, which, in disregard of tactical considerations, had been placed in the forefront of the measure, excited Parliamentary opposition, and, from the point of view of technical accuracy, other provisions of the Bill were open to criticism. The failure of the measure gave a check to the cause of codification in England." [1]

The harvest of codification Bills in the years immediately succeeding this failure was indeed small, but it was not unimportant. The ninth decade of the century saw the passage of the Bills of Exchange Act, 1882, drawn by Sir Mackenzie

[1] Ilbert's *Legislative Methods and Forms*, p. 128.

VI. Chalmers, and the tenth decade saw the passage of the Partnership Act, 1890, drawn by Sir Frederick Pollock, and the Sale of Goods Act, 1893, again the work of Sir Mackenzie Chalmers. A Bill to codify the law relating to Marine Insurance, also drawn by Sir Mackenzie Chalmers, was introduced more than once by Lord Herschell, but it did not reach the Statute Book until 1906.

It appears now desirable to review the work done in more recent years, both in consolidation and codification, and to consider the programme for the immediate future. For this purpose it is convenient to distinguish between the measures of consolidation and those of codification.

### 1. Consolidation

From a memorandum prepared for the Statute Law Committee in 1918, it appears that between 1887 and the date of the memorandum 70 Acts, including such great enactments as the Merchant Shipping Act, 1894, the Trustee Act, 1893, the Patents and Designs Act, 1907, the Factory and Workshop Act, 1901, the Companies (Consolidation) Act, 1908, the Post Office Act, 1908, and the Income-Tax Act, 1918, were passed, most being pure consolidation, but many also introducing amendments of the law. In addition, many Scottish consolidation Acts consolidating Statutes applying solely to Scotland were passed in the same period. Since that memorandum was compiled, only one measure of pure consolidation has been passed into law, namely, the Education Act of the Session of 1921. Three

other Acts, the Unemployment Insurance Act, 1920, The Increase of Rent and Mortgage Interest Restrictions Act, 1920, and The Police Pensions Act, 1921, passed since 1918, whilst they consolidate the Statute law on those subjects, at the same time introduce amendments. At the present moment two pure consolidation Bills, the Supreme Court of Judicature Bill, and the National Health Insurance Bill, are being prepared. A Bill consolidating and amending the Salmon and Freshwater Fisheries Act was introduced in the House of Lords this Session, and other Bills, which combine consolidation with amendment, are in course of preparation.

The branches of the law fit for, and urgently requiring consolidation, and the order of precedence in which the Bills consolidating those branches could most conveniently be proceeded with, were the subject matter of a report of the Statute Law Committee in 1918. When references in the Report to matters which have already been disposed of are omitted, the branches of the law then recommended for consolidation and still outstanding are as follows :—

(1) Parliamentary Elections.

(2) Excise Licences, House Tax and Stamp Duties.

(3) Juries.

(4) Public Health.

(5) Public Carriages in London.

(6) Drunkenness.

These recommendations were made three years ago, and events which have passed since then require a reconsideration of the programme.

VI. Recent legislation renders it desirable that the County Courts Acts should be consolidated as soon as possible, and legislation, which has yet to come and which is urgently required, will increase the necessity for this step. Further, now that the Law of Property Bill has passed into law, in the course of the Session of 1922, it will become imperatively necessary to consolidate Conveyancing Acts, the Settled Land Acts, and many other branches of the law of real property.

There is no inherent difficulty in expediting consolidation, and if, as appears probable, the bulk of new and amending legislation tends to diminish, those responsible for the preparation of consolidation Bills, and Parliament itself, will have more time to devote to the matter.

To facilitate the work of consolidation, it is highly desirable that public opinion should be stimulated in its favour. At present the work excites no enthusiasm. Its advantages are admitted, and Parliament has in recent years made no difficulty about passing Bills which are certified by the Joint Select Committee on Consolidation to be measures of pure consolidation. But often consolidation, though not actively opposed, has to encounter passive resistance on the part of those persons most concerned in the administration of the branch of the law to be consolidated. And this is not unnatural, for such persons are thoroughly conversant with the existing Acts, however confused they may be, and shrink from the trouble of having to learn their way about a new Act.

Such persons often, when the consolidation has been effected, become converts to the advantages of consolidation. Probably much could be done to educate public opinion in favour of consolidation, with the consequence that there would be an impetus behind it which it at present lacks, and there would result far greater activity in this method of improving the form of the law than has been characteristic of the past. It is an encouraging sign that the demand for a consolidation of the Judicature Acts comes from, and has been pressed by, the Council of the Law Society, and that in the last few days the Society of Medical Officers of Health have approached both the Lord Chancellor's Office and the Ministry of Health with a request for a consolidation of the laws relating to public health.

If, however, the programme sketched above is to be carried out successfully, concentration of effort upon its principal items is called for rather than dissipation upon too many objects at once. The immediate necessity is for a consolidation of the Judicature Acts, to be followed, if it be practicable, by a revision and consolidation of the Rules of the Supreme Court. As I have said, the changes of the law to be effected by the Law of Property Bill must be followed immediately by further legislative work. The work is heavy and the labourers are few.

## 2. Codification

Very different considerations apply to codification. In the first place, there is an acute diverg-

VI. ence of opinion as to the expediency of converting unwritten into written law, and, in the second, there is the great practical difficulty of making sure that the written code correctly reproduces the existing law.

The first objection rests in part upon the exaggerated form in which Bentham's propositions were originally propounded. To him unwritten law in itself was hateful. "Its origin is unknown; it goes on continually increasing—it can never be finished; it is continually altering, without observation." Therefore he regarded it as "necessary to forbid the introduction of all unwritten law. It will not be sufficient to cut off the head of the hydra: the wound must be cauterised, that new heads may not be produced. If a new case occur, not provided for by the code, the judge may point out and indicate the remedy: but no decision of any judge, much less the opinion of any individual, should be allowed to be cited as law, until such decision or opinion has been embodied by the legislator in the code. . . . Finally, once in a hundred years, let the laws be revised for the sake of changing such terms and expressions as by that time have become obsolete—remembering that this will be more needful in regard to the language of the legal formularies in use, than that of the text of the laws themselves."

This is in fact the theory of the French code under which the French Courts, within the limits prescribed by the codes, decide according to their own views of justice and expediency, and are not bound by previous decisions upon the same words.

The results are sometimes curious. For twenty-seven years the Court de Cassation held that to kill a man in a duel did not fall within the definition of " meurtre " in the Code Pénal. In 1837 the then Court held the opposite view, and it is believed that the Court has continued to do so ever since. The first person who was so unfortunate as to be dealt with by the Court in its changed frame of mind may well have felt that there are some advantages in a law which is determined by precedent rather than by one which is so inconveniently elastic. But the long chain of decisions in one sense up to 1837, and in the opposite sense since that date, is either a proof of the remarkable clarity with which the Gallic mind, disregarding precedent, has arrived, during each of these periods, at the same conclusion and arguing from the same premises, or more probably illustrates the maxim " Naturam expellas furca, tamen usque recurret." In truth, whatever injunction the law may impose upon a Judge to stop his ears against the decisions of his predecessors, his common sense will compel him to have regard to those decisions, and there will grow up round the code a mass of unwritten precedent. Indeed in France the jurisprudence *des tribunaux*, though not binding, seems to be acquiring an increasing influence.

The attempts at codification therefore now contemplated will not possess that which Bentham regarded as the essential characteristic of a code, in that they will not exclude the consideration of such unwritten law as will necessarily come into existence in the course of their interpretation by

VI. the Courts. It will also fail to possess another characteristic—that of completeness. It must necessarily be incomplete. We must "go on adding one to one," knowing that before the full tale is complete changing conditions of social and commercial life will require the promulgation of fresh codes on new subjects and the transformation of old ones.

These conditions being premised, the codification of the criminal law and the codification of the civil law require separate discussion.

As regards criminal law, the cessation of effort consequent upon the failure in 1882, which has already been described, remained unbroken until 1908, when under Lord Loreburn's Chancellorship the matter again was taken seriously in hand. The codification of the law of criminal procedure was first considered. But on this it was decided that amendment must precede any attempt to codify the law. The passage of the Criminal Appeal Acts, 1907 and 1908, the Costs in Criminal Cases Act, 1908, and the Indictments Act, 1915, has had the effect of rendering the law of criminal procedure to a large extent statutory, and such work as is now required upon this subject partakes more of the nature of consolidation than of codification.

With respect to substantive criminal law, Lord Loreburn and his advisers, taking warning from the example of their predecessors, decided that it was expedient to abandon the ambitious attempt to produce a complete code of law. They determined, therefore, to proceed piecemeal to codify the several branches of the law seriatim,

so that when the process had been completed the various chapters dealing with the several branches might be incorporated in a single Act which would constitute a complete criminal code so far as substantive law was concerned. VI.

Stephen desired to proceed on similar lines, but with this important modification—that he proposed that each branch of law, when codified, should remain as it were in escrow until the whole work was finished, and that the whole code should be brought into operation *uno flatu*.

As the procedure which has been adopted for the codification of the criminal law will prove a useful precedent for the codification of any branch of the civil law which it may be decided to take in hand, it is useful to set out here in some detail the course pursued with the Bills codifying the branches of the criminal law from the time when the work was resumed in Lord Loreburn's Chancellorship.

A barrister thoroughly conversant with criminal law and practice is appointed to draft (subject to the general control of the Parliamentary Counsel) a Bill dealing with a particular branch of the criminal law. His instructions are that the draft must reproduce the existing law as far as possible unaltered. The draft is then considered by a Committee presided over by a Judge of the High Court specially conversant in criminal law (the invaluable experience of Mr. Justice Avory has been available for this purpose), which comprises, besides the draftsman, the Director of Public Prosecutions, and the Parliamentary Counsel, some of the best-known practitioners in the

VI. Criminal Court. The Committee go through the draft with extreme minuteness, examining it word by word to see that there is no departure from the existing law. When they have settled the Bill they draw up a report calling attention to any ambiguities in the existing law and any slight deviation from it which they consider justified. At the same time they often point out how, by assimilation of punishments, greater simplification and improvement can be effected; and, further, they note imperfections in the existing law, such as acts which under the existing law are not covered but should be penalised. The Bill is then introduced in the House of Lords, and, after a Second Reading, is referred to the Select Joint Committee of both Houses on Consolidation. This Committee again examines the Bill in considerable detail, but relies on the evidence given by the draftsman as to the points with respect to which the provisions of the Bill differ from those of the existing law or as to any doubts arising on the existing law. They also consider recommendations for the simplification and improvement of the law. They make such amendments in the Bill as they consider advisable, either with a view to improving its form or in order to bring it into closer conformity with the existing law; and they report the Bill to the House, usually embodying in their report recommendations that certain amendments should be made in the interests of simplification and improvement. Little difficulty hitherto has been experienced in inducing Parliament to give effect to the recommendations of the Committee.

In this manner Bills dealing with Perjury (1911), Forgery (1913), and Larceny (1916) have been introduced and passed into law, and a Bill dealing with frauds and falsification is in preparation. It is hoped that this Bill may be ready for introduction next Session.

When the Frauds Bill has been passed, the codification of the whole criminal law dealing with offences involving dishonesty will have been completed. If the Criminal Code Bill of 1882 were brought up to date, it would be found to include about 400 clauses, and of these about 100 would deal with offences of this nature. It may be said, therefore, that when the Frauds Bill is passed, roughly one-fourth of the work will have been finished. Twelve years will have been occupied in the process. Such slow progress is to some extent accounted for by the interruption caused by the War, but there is no reason why the work should not be expedited in the future, and if one Bill were passed every year the work ought to be completed in the course of the next twelve years.

In the branches of the criminal law which have thus been codified common law has formed but a very small proportion of the subject-matter of the measures. Nine-tenths at least of the law reproduced by these Acts was taken from Statutes passed to modify or extend the common law in relation to the offences in question. The remaining tenth alone represents the common law; but the settlement of that tenth was more troublesome by far than all the rest put together.

Turning now to the civil law the history of

VI. the matter is widely different. No settled policy with respect to codification has been laid down, and such codification as has been effected has proceeded haphazard. In relation to this matter, as in the case of the criminal law, it is necessary to distinguish between the law of procedure and the substantive law.

The law of procedure has to a great extent found statutory form in the Judicature Acts and the County Courts Acts, or has been embodied in the subordinate legislation which is expressed in the Rules of Court. I have already drawn attention to the urgent necessity of consolidating the Judicature Acts and of undertaking the revision of the Rules of the Supreme Court. The principal question here is whether the law cannot be simplified rather than whether unwritten law should be converted into written law.

There remains the question whether it is expedient to codify, in whole or in part, the substantive civil law. As has been already pointed out, to embark on the preparation of a complete civil code would be impracticable, and would necessarily lead to failure.

It may be argued that the fact that Mr. E. Jenks, with the collaboration of four eminent Oxford jurists, has been able in the course of twelve years (1905 to 1917) to prepare and publish a code of the law of contract, tort, property, family relations and succession, proves that a complete code of the English civil law might be successfully constructed. But an examination of that work shows that, however successful the authors may have been within the limits which

they imposed upon themselves, those limits are very narrow, and would not be tolerated in any official code. Mr. Jenks' Code is not, and does not profess to be, a complete exposition of the law on the subject with which it deals. It is merely a summary of the leading principles of that law framed on the same lines as the German Civil Code. In this it is true to type. Foreign civil codes are little more than statements of general principles, and would never satisfy English requirements. "A code," says Mr. Montague, "never can contain more than statements of principle, the details of the law must be developed by the same agencies as before." [1] The subject of insurance, for instance, is dealt with by Mr. Jenks in a title comprising 11 paragraphs which extend (with notes) over 6 pages of large type. The Marine Insurance Act, 1906, which is a complete code of the law of Marine Insurance, alone has 94 sections and 2 schedules, and extends to 31 pages of the Statute Book, much more closely printed than those of Mr. Jenks' Code. The only subjects with which Mr. Jenks deals in detail are the sale of goods and partnership; and in these matters the code reproduces practically verbatim the existing Acts codifying those branches of the law to which reference has already been made.

A code of commercial law constructed on the lines of Mr. Jenks' Code would be useless to the trading community. Probably, indeed, it would do more harm than good, for it would mislead. There would always be the danger that a vital part of the law had been omitted.

[1] *Op. cit.* p. 54.

VI. If any civil codification therefore is to be attempted, it must be on a far more extensive scale, and for this and for other reasons it must be proceeded with by stages. The question therefore arises as to which branch of the law is best adapted for codification ?

To the solution of this question two principal criteria must be applied :

1. The benefit to be anticipated from codification.

2. The ripeness of the law for codification.

The branch of the law from which most benefit may be anticipated and which at the same time is most ripe for the purpose is commercial law. It is sufficiently developed and stereotyped to be susceptible of codification, and it is within the realm of commercial law that such measures of codification as have hitherto been passed are to be found. Further, it is among the commercial community that the demand for codification principally arises ; and those occupied in particular branches of commerce, such as underwriting or carriage by sea, are by education and experience best fitted to obtain advantage from it.

Sir John Macdonell in his paper on the Codification of the Commercial Law of the Empire[1] summarises the contents of three foreign commercial codes, those of the Netherlands, Italy, and the Argentine, and points out that most of the chapters fall into the following groups :

[1] Printed in the *Journal of the Society of Comparative Legislation*, New Series, No. XXXVI.

(*a*) Partnerships.
(*b*) Companies.
(*c*) Agency (including authority of Factors).
(*d*) Sale.
(*e*) Lien.
(*f*) Contract of Guarantee.
(*g*) Insurance (Fire, Life, Marine).
(*h*) Merchant Shipping.
(*i*) Contracts with carriers by land.
(*j*) Contracts of affreightment.
(*k*) Bills of Exchange and negotiable instruments.
(*l*) Bankruptcy.

Speaking roughly, fully three-fourths of the subject-matter of the codes so summarised is (according to Sir John Macdonell) covered by Statute Law in England, namely, by the Partnership Act, 1890, the Companies Consolidation Act, 1908, Factors Act, 1889, the Sale of Goods Act, 1893, the Marine Insurance Act, 1906, the Merchant Shipping Act, 1894, the various Railway Regulations Acts and the Carriers Act, the Bills of Exchange Act, 1882, and the Bankruptcy and Deeds of Arrangement Acts of 1914, the chief gaps being groups (*c*), (*f*), and (*j*), "not the largest or most intractable parts of the subject."

Whether this estimate of the position is strictly accurate may well be open to question. For instance, the Sale of Goods Act does not attempt to deal with the particular considerations applying to special contracts of sale—even to such contracts of everyday occurrence as c.i.f. contracts; the Companies Act is merely a Statute overladen with and clogged by judicial decision. Again, the questions which may arise upon the construction of a Charter Party or a Bill of

VI. Lading may, with the changing circumstances of commerce, be almost infinite in their variety.

Whatever obstacles may arise, however, commercial law is clearly marked out as the branch which, if codification is to be attempted, should be first taken in hand; but, even though a large part of the field is already covered by Statute Law, what remains is still far too vast to be undertaken simultaneously, and it is necessary that a programme should be laid down as to the order in which the subjects should be approached.

To arrive at a decision upon such a programme the first step is to appoint a Committee to consider the matter, and upon such a Committee, while it must comprise a strong body of expert legal opinion, there must be also a large element of commercial men. As Sir John Macdonell pointed out in the paper to which I have referred above, if substantial progress is to be made, the goodwill and the help of business men must be enlisted.

When the programme has been laid down, or at least when the subjects first to be attempted have been selected, the procedure to be followed will be that which has already been described as used for the codification of the criminal law. A Committee, therefore, will be set up under whose direction a skilled draftsman will prepare the Bill. The Criminal Law Committee was composed solely of lawyers. The Committee for the commercial Bills must not be confined to members of the legal profession, but must comprise also representatives of the trading community.

It will have been gathered from the preceding

part of this paper that the hands of all those who advise the Government in the preparation of legislation are likely to be occupied very fully in the immediate future if the work which I have sketched out is to be undertaken and pushed on. I have a firm hope, however, that a beginning can be made with commercial codification at a very early date. Questions addressed to me upon this subject were placed upon the Order Paper of the House of Lords during the summer of 1921, but no opportunity arose for me to make any detailed statement in reply to them. Had I been able so to do, I should have endeavoured in my speech to indicate the lines upon which I hoped substantially to advance, as I have done in the present article.

There are, however, two dangers which should be borne in mind by those upon whose shoulders will rest the burden of preparing the measures.

Sir John Macdonell, in the paper referred to above, says that the process of codification is a process of improvement in the substance as well as in the form of the law. But if those charged with the preparation of the Codification Bill set out with the intention of improving the law, controversies are certain to arise. It is essential that the Bills should be prepared in the first instance with the intention of reproducing the existing law without any amendment. Any deficiencies and inequities in the law which may be found to exist in the preparation of the codifying bills must be pointed out to Parliament, and Parliament must be left to introduce the necessary amendment if it see fit so to do.

VI. Again, there is a special danger incident to the codification of any branch of commercial law. Commerce is an international concern, and the uniformity of law under which it is carried on throughout the civilised world is a matter of the highest importance. At the present moment the commercial law of England, so far as it forms part of the common law, is the law not only of England but of most of the great Dominions and of the United States of America. If this branch of the law is codified in England without the adoption of the code by those parts of the British Empire to which it at present applies, this uniformity will to some extent be impaired, and codification will to that extent be a retrograde step. It will therefore be necessary that codification of any part of the commercial law should be attempted in consultation with, and if possible in co-operation with, the Dominions.

These dangers form no reason for not undertaking the task. I hope that at an early date it may be possible to take the first step towards its initiation.

# VII

## WADHAM COLLEGE AND THE LAW



If for a fugitive moment to have been the University home of lawyers is a distinction for a college, fortune was kind to Wadham some thirty years ago. In 1890 Mr. Justice Roche came up; I joined him at the scholars' table next year with C. B. Fry, who was, as an undergraduate, already one of the best-known men in England, and in the following year, Sir John Simon was elected scholar. Mr. Justice Acton had left Wadham two years before our time, but Mr. H. M. Giveen, now counsel to the Treasury, was only a little senior to us, and gained the Vinerian scholarship two years before I myself was fortunate enough to defeat the learned author of the History of English Law.

It is doubtful whether any college could surpass, or even equal, this record; but Wadham could boast of legal lights of real eminence before this. The name of Lord Westbury is one of the great names of the English Bar and Bench, and of his obligation to Wadham he has left a grateful record on the monument in the Chapel, erected by his special request: "Fortunarum suarum principium ab eo die memor repetebat quo

VII.

annum aetatis XV. conficiens Scholaris Collegii Wadhami annunciatus est." And this statement was much more true than many funeral inscriptions; admitted when he was only a few months over fourteen, "while still wearing a jacket and frill," Bethell found in his scholarship, the Wills Law exhibition, then recently founded, and finally in his fellowship, the means to complete his Oxford course, and then to tide over that period of waiting which, whether long or short, is the necessary beginning of every legal career. And the chance which opened the way for him to fame and fortune came directly from Oxford; his brilliant performance in Viva Voce in the Final Classical Examination of 1818 so impressed his examiners that, when one of them, Dr. Gilbert, became Principal of Brasenose in 1822, he persuaded his college to put an important case in the hands of the young Wadham barrister. Bethell carried it through successfully both in the court of the first instance and on appeal to the House of Lords. Henceforth his success was assured, and for the next fifty years he was a leader in English law circles, with a tongue that was dreaded almost as much by the Bench as by the Bar. He was prominent especially in the sphere of Law Reform, and it is one of the tragedies of English legal history that his career as a law reformer was cut short just at the moment when, as Lord Chancellor, he had gained at last the position from which he especially hoped to carry out his plans. The codification of English Law, which he always advocated, remains a thing even to-day incomplete; but Probate,

Divorce, Trusteeship, and Bankruptcy are only some of the legal fields in which he left behind him permanent improvements. Perhaps, however, he will be especially remembered as the subject of many stories, authentic or otherwise, and for one of his judgments, that in the Judicial Committee of the Privy Council on "Essays and Reviews," by which it was said he "dismissed Hell with costs" and "took away from orthodox members of the Church of England their last hope of everlasting damnation." VII.

Lord Westbury will always be recalled—in his own college at any rate—as the founder of the College Book Club, which still flourishes after more than a century, and serves as a bond of union between dons and undergraduates. However sharp-tongued he might show himself to the world outside, to Wadham he was always kindly, and he is commemorated there not only by the monument above mentioned, but also by his bust, left by himself, "the best of the three" by his especial request.

Among his legal contemporaries at Wadham was Charles Purton Cooper, Bencher and Treasurer of Lincoln's Inn, and one of the most voluminous of English law writers; as Secretary to the second Records Commission, he obtained a reputation as a jurist which was continental; he was one of the first Englishmen to make the law reports of the Supreme Court of the United States familiar and accessible to our lawyers.

Curiously enough, the Wills Legal Exhibition, which helped Bethell in his career, was not held

VII. by some of Wadham's most distinguished lawyers in the nineteenth century; neither Benjamin Bickley Rogers nor Frederic Harrison ever gained it. The former was one of the many Lord Chancellors at the starting post who never realised their friends' expectations; the early coming-on of deafness spoiled his legal career, and his fame, though secure, will be confined to the comparatively small circle which appreciates, in his *Aristophanes*, an inspired translation of a classical author. The Fellow preferred to Rogers, who had the reputation, fairly well deserved, of being one of the ablest lawyers of his generation, was Henry King, who held his fellowship at Wadham for more than forty years, and rose no higher than to be Librarian of the Garrick Club, and translate Ovid's *Metamorphoses* into tolerable English verse,[1] the MS. of which was his sole bequest to his college.

Rogers' younger contemporary as a Fellow of Wadham was Frederic Harrison, still surviving as the last of the brilliant band which made Wadham known all over the Western world as the home of English Positivism. He had probably too many interests to give to Law that exclusive devotion which she claims of those who win her prizes, a devotion in which she admits no rival but Politics. Prior says that Lord Mansfield once "drank champagne among the wits," and Pope introduces him in the "Dunciad" as one of those who might have been men of genius,

[1] His long tenure of his fellowship was in defiance of the regulations of the Founder, which unfortunately were abolished by the Statutory Royal Commission of 1854; "reforms" sometimes create abuses as well as remove them.

but who had sunk into lawyers and politicians ;[1] Frederic Harrison, essayist, historian, literary critic, theologian, philosopher, certainly missed his chances at the Bar by his brilliant versatility. But his eminence as a philosophic lawyer may be judged from the fact that his lectures on Jurisprudence and the Conflict of Laws, delivered in the Middle Temple Hall by him as one of the Inns of Court Professors in 1878–79, have become a text-book on both sides of the Atlantic, and were reprinted by the Oxford University Press as late as 1918. This is a long duration of life for professorial lectures. VII.

The most distinguished lawyer after Lord Westbury who has held the Wills Legal Exhibition was Henry Studdy Theobald, elected Fellow of Wadham in 1871, whose work on *Wills* is an acknowledged authority, and who, in spite of infirmity, attained to be a King's Counsel and a Master in Lunacy.

The legal turn of Wadham's Fellows is by no means entirely accidental. The Founder's dying wishes were embodied in the Statutes by his widow, the Foundress, Dorothy, a name honoured by all Wadham men, and they allowed perfect freedom in the choice of a profession to the Fellows ; there was no obligation to take Holy Orders. In this and in another important respect the Founder's Statutes anticipate the arrangements of the Second University Commission of the nineteenth century ; his fellowships were

[1] There Talbot sank and was a wit no more.
How sweet an Ovid, Murray was our boast !
How many Martials were in Pulteney lost !

VII. not for life, but for eighteen[1] years from "regency"; this meant that at the age of a little over forty a Wadham Fellow found it necessary to provide himself with a profession; he could not live in College all his life "in supine enjoyment of the bounty of the Founder." It was owing to these two peculiarities in the Statutes that at Wadham a larger proportion of the members of the foundation sought the professions of Law and of Medicine than were furnished by more clerical colleges; and, to encourage this tendency still further, Dr. Wills (Warden 1785–1806) founded not only the Legal Exhibition, already mentioned more than once, but also a similar one for Medicine. It would be tempting to enumerate Wadham's great men in the last-named study, beginning with the greatest of England's general practitioners, Thomas Sydenham, and to dwell on Wadham's scientific connection, which made it one of the "cradles" of the Royal Society; certainly, if any one man can claim the honour of having begotten that most distinguished infant, it is Dr. Wilkins, the intruded Warden of the Commonwealth times, in whose lodgings were held the meetings of the "experimental philosophical club, which began in 1649, and was the incunabula of the Royal Society."[2] Wilkins, as Warden, admitted to Wadham "that prodigious young scholar, Mr. Christopher Wren," and he was later (1660) Chairman of the London Committee for organis-

[1] This period was fixed by the Founder at "ten years"; but Dorothy added eight more at the request of the College Visitor, the Bishop of Bath and Wells.

[2] Aubrey, *Brief Lives*, ii. 301.

ing a "College" to promote "physical, mathematical, experimental learning." It was this college which, by Royal Charter in 1662, became the Royal Society.[1] VII.

But Wadham's distinctions in Natural Science cannot be further dwelt on here, where our task is rather to indicate how the Founder's liberality of statutes had its reward in producing famous lawyers. Wadham's first Lord Chancellor, however, can hardly be counted to the Founder's credit, for it was the Civil War, and not academic considerations, which brought Sir Edward Herbert, Charles I.'s Attorney-General, to reside in Wadham. He was admitted Fellow Commoner in 1643, and resided for about two years, during which time he had an experience almost unique in college history, for his wife bore him two sons in his college rooms; the only record of these poor infants is their baptism, speedily followed by their burial in the burying-ground at the back of the college. College rooms are delightful for healthy young men, but not adapted for young babies. Herbert refused the Great Seal when it was offered him at Oxford, but accepted it later at Paris in 1653 from Charles II.; whether he may count at all as a Lord Chancellor for Wadham is a nice point, which only the House of Lords could decide finally.

[1] Of the committee of twelve, three were Wadham men, and the first historian of the Royal Society, Dr. Sprat, was also one of Wilkins pupils; he later was Dean of Westminster and Bishop of Rochester, and a member of the High Commission Court of James II., and has a very unattractive portrait in Macaulay's *History*. When celebrating its 250th anniversary in 1912, the Royal Society, and its visitors from all over the world, made a pilgrimage to Oxford and to Wadham.

VII. There is, however, no doubt as to the Baron Wyndham of Finglass, who was Lord High Chancellor of Ireland from 1726 to 1739, and who, according to the inscription on his monument in Salisbury Cathedral (which is of portentous length, running to over 300 words, without counting the supplementary inscription on the stone below, which has some 50 more), was a "strenuous asserter of lawful liberty," and a "zealous minister of justice." In spite of this somewhat conventional praise, his memory is forgotten except in his own College, where he is commemorated with good reason as one of the most liberal of our benefactors. He was a genuine Wadham man, descended directly from the Founder's sister. The famous Wyndham family, at present represented by Lord Leconfield, has had no less than eighteen representatives at Wadham; the first two of these, the Founder's great-nephews, were judges at the same time in the reign of Charles II., one on the King's Bench, the other in Common Pleas.

In the next generation to Lord Wyndham, Wadham gave to the Bar a much more famous son in Arthur Onslow, but he deserted the law for politics, and holds the record among Speakers of the House of Commons. Over that august body he presided for thirty-four years; he is probably the most famous occupant of that famous chair, for under him was fought out the "great Walpolean battle," and the traditions of the "Mother of Parliaments," then but newly come into her own, were formed under his guidance. His portrait hangs over the Scholars'

table in the Hall, and the splendid service-books which he gave still adorn the Chapel. VII.

Before leaving Wadham lawyers of the seventeenth century, two more must be briefly mentioned. One of these, Richard Zouch, became a member of the College in 1623, being then Regius Professor of Civil Law. He is one of the founders of International Law, and his work on the privileges of ambassadors was quoted for a century as an authority in the courts of Europe. It was called forth by a murder committed in the time of Cromwell, by a brother of the Portuguese ambassador, who, in spite of his diplomatic privilege, was condemned and executed. Zouch, who was presiding judge in the High Court of Admiralty both before and after the Great Rebellion, was one of the judges in the case. Altogether, Zouch is credited by Dr. Holland in the *Dictionary of National Biography* with sixteen learned works. A Wadham lawyer on the opposite side, and with a very different reputation, was Nicholas Love, who sat in the High Court of Justice which condemned Charles I., but he escaped the fate of the other regicides by fleeing to Switzerland, where he resided till his death.

Wadham lawyers of the first and the third centuries of the College have been briefly dealt with; it remains to speak even more briefly of Wadham's two Lord Chief Justices, both of the eighteenth century, John Pratt [1] and William Lee. Their lives are told at length and with great raciness by Lord Campbell in the second volume of his

[1] Pratt, however, came up in 1674, while Onslow, who has already been mentioned, came up in 1708.

VII. *Lives of the Chief Justices*; but he shows, perhaps, even more than his usual malice; it almost seems as if he had wished to revenge on Bethell's predecessors the sharp words which Bethell had used so freely in pleading before him.

John Pratt was a good Whig, as was usual under the later Stuarts in a west country College like Wadham,[1] and on the accession of George I. he was appointed as a safe judge and a sound party man. Campbell with malignant patronage introduces him as a "worthy person," "unredeemed from insipidity by the commission of a single crime"; he goes on to say that he was promoted to the post of Chief Justice because he had given "full proof of his docility and inoffensiveness."

[1] During the first century at least after its foundation, considerably more than half of Wadham's sons were drawn from Somerset with East Devon and West Dorset; this local tradition was maintained in a less degree in the period following, and still to some extent sends men to the College. This is the more remarkable, as there were no local restrictions in the Founder's arrangements as to scholarships and fellowships; all but three of these, reserved for his sisters' descendants, were completely open. But he himself was a Somerset landowner, the Visitor appointed was the Bishop of Bath and Wells, and the buildings were erected by Somerset men, and are inspired by the tradition of that county, one of the richest in England in architectura wealth; the Chapel of the College especially is the choir of a great Somerset church.

Wadham has had the good taste or the good fortune to leave its buildings alone, so that they are a unique specimen in Oxford (like Clare College at Cambridge) of the original design carried out completely and preserved.

At the same time it must be noted that of the Wadham worthies mentioned in this essay, only four were in the strict sense west country men—Blake and Sydenham, and the two Wyndhams; but of these four, two at least are among England's greatest in their respective callings. Wren and Bethell, too, though born in Wiltshire, may be ranked among the west country men, for the choice of a college for them was probably determined by the old tradition.

It is sad that local traditions have in our day so completely died out, except in athletic competitions, giving place to a dull uniformity, or to bitter class divisions.

The most interesting case in which he was concerned as Chief Justice (1718–1725) was the interminable quarrel between the great Dr. Bentley, as Master of Trinity, Cambridge, and his Fellows; this came before Sir John Pratt at two points, and on both he decided for the great scholar against his persecutors. It will hardly be suggested that he was moved to do so by college feeling, but Bentley had been a member of his college, incorporating as he did at Wadham about ten years after Pratt went down; but it seems surprising to our day that in his decisions he had to resist pressure from the highest quarters; Sir Robert Walpole tried to influence the Chief Justice in favour of Dr. Colbatch, Bentley's opponent, and accounted for Sir John Pratt's righteous refusal by saying "Pratt has got to the top of his preferment, and is therefore refractory and not to be governed." Colbatch was condemned in 1722 for having—as was thought—spoken slightingly in his *Jus Academicum* of the Court of King's Bench. In the following year the Chief Justice granted a mandamus against the University of Cambridge, compelling it to restore Dr. Bentley to his degrees, of which he had been unconstitutionally deprived; Pratt admitted that Bentley had behaved very badly in calling the Vice-Chancellor "a fool" (*stulte egit*), but as he sensibly added, "The Vice-Chancellor's authority ought to be supported, but then he must act according to law, which I do not think he has done in this instance."

It is something to have given two right decisions in that long struggle of over thirty years, but

VII. Sir John Pratt's chief claim to distinction is, after all, that he was the father of the great Lord Camden. His portrait, with Onslow's and Sprat's, hangs over the Scholars' table in Wadham Hall.

Chief Justice Lee was about thirty years junior to Pratt at Wadham, and succeeded him as Chief Justice after twelve years, in 1737; his immediate predecessor on the King's Bench was the great Lord Hardwicke, and Campbell begins his depreciation of Lee by saying that to Lord Hardwicke was applied the familiar line of Pope, that he, like Addison, could

> Bear, like the Turk, no brother near the throne;

he therefore was thought to have chosen to succeed him one of his puisne judges, who could "never in any way be formidable to a Chancellor." This line of depreciation continues throughout the biography, though he quotes the evidence which refutes his own strictures. Perhaps his frugal Scotch temper was offended by Lee's abundant hospitality, for his dinners, served by a French cook, with claret and champagne in abundance, were famous in the annals of the Bar. During the seventeen years that he presided on the King's Bench, Lee certainly was thought by many to have been a success, even to have been "a great man." As judge in the trials for treason after "the '45," he made several important rulings, which have since been held good, and his decisions as to the Sexton's Office in the parish of St. Botolph will commend itself to the enlightened opinion of our own day; in this

case he decided (1) that a woman could be a sexton, and (2) that women voters were to be counted as equal to men voters.

Unfortunately for his reputation, Lee not only kept a diary, but allowed it to be read after his death; among the entries the following is remarkable: "Six bushels of oats for four horses per week; walking them in dewy grass in the morning very good; for rheumatism, elder tea. I married to Mrs. M. M." In excuse it should be added that the lady was his second wife; but the entry may be compared to one in the diary of a greater man, the scholar Casaubon: "Little work done to-day; I read only nine hours. I was married." Mrs. Casaubon's diary (if she kept one) is unfortunately lacking.

It is sad to end this notice of Lee by saying that he not only took no degree at Oxford, but that his contemporaries all predicted he would starve as a lawyer; his tutor, however, had the prescience to foretell that "plodding and perseverance" might raise him to be Chief Justice —a remarkable prophecy, if it be authentic.

Only one other eighteenth-century Wadham judge need be noted, William Draper Best, afterwards Lord Wynford, who was Chief Baron of the Exchequer. As a judge he is especially famous as one of the stout old Tories of the Eldon school, which drew on him the angry wit of Sydney Smith, who, however, like many critics, had not carefully read the judgment he bitterly criticised. Chief Justice Best is the victim of one of the most curious pieces of index-making known in law books; in one of the

VII. editions of Williams' *Law of Real Property* comes the remarkable entry, "Chief Justice Best—his great mind." On turning up the reference, the entry will be found, "The Chief Justice said he had a great mind to commit the plaintiff." I have not verified this reference myself, but I was told by a very learned counsel that he had done so.

It would almost make Lord Wynford turn in his grave to know that his portrait in the Hall was copied for a grandson, who was a Radical peer; and the old man was one of the "last-ditchers" in the House of Lords against the Reform Bill of 1832.

Among the men of the present generation, Wadham's legal ability is said to be promising well for the future, and its "Moot" to be one of the best in Oxford. May it prove to be so!

The Bench and the Bar have not the reputation of having produced at Wadham saints like Dean Church or Canon Barnett, heroes like Admiral Blake, or great architects like Sir Christopher Wren and (may I add) the still living Sir Thomas Jackson, but they are the props and the pillars of our ordered life, and the glory of English Justice is not the least of the glories which the English-speaking race in every continent of the world holds in common affection and reverence.

# VIII

# DIVORCE REFORM

## A Speech on the Second Reading of the Matrimonial Causes Bill in the House of Lords (Wednesday, March 24, 1920)

Law cannot command love, without which matrimony hath no true being, no good, no solace, nothing of God's instituting, nothing but so sordid and so low, as to be disdained of any generous person. Law cannot enable natural inability, either of body or mind, which gives the grievance; it cannot make equal those inequalities, it cannot make fit those unfitnesses; and when there is malice more than defect of nature, it cannot hinder ten thousand injuries and bitter actions of despite, too subtle and too unapparent for law to deal with. And while it seeks to remedy mere outward wrongs, it exposes the inward person to others more inward and cutting. All these evils unavoidably will redound upon the children, if any be, and upon the whole family. . . . Nothing more unhallows a man, more unprepares him for the service of God in any duty, than a habit of wrath and perturbation, arising from the importunity of troublous causes never absent. And when the husband stands in this plight, what love can there be to the unfortunate issue, what care of their breeding, which is the main antecedent to their being holy?—Milton.

My Lords, I have to announce that Lord Muir Mackenzie has received a Petition, addressed to myself, which he informs me is signed by 100,000 names, asking your Lordships to give a Second Reading to this Bill; and I am told by the noble Lord that the signatures to this Petition have been collected in the fortnight which has

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passed since this subject first engaged the attention of the House.

It is convenient that I should make plain at the outset what is the attitude adopted by the Government in relation to this Bill. On this point their view is that, upon a subject which so much perplexes the consciences of individuals, it would not be proper that the Government should give such direction as is afforded by putting the Government Whips in charge of the Division. Therefore all members of the Government in this House, and if the measure should so far proceed as to be considered in another place, in that place also, will be free to speak and to vote in accordance with their own views ; but I think it right to add this—that if your Lordships decide to give a Second Reading to the Bill and to pass it through all its stages in this House, it will be evident that a new situation has been created. The resulting situation will be re-examined by the Government, and the conclusion reached by this House will, of course, be treated as a significant conclusion, and one which cannot be ignored when a decision is taken as to whether or not facilities can be found for the discussion of the Bill in the House of Commons.

On the last occasion on which this matter was discussed the House listened to a most interesting speech from Lord Gorell. He expressed to your Lordships his own view of the attitude which his distinguished father would have adopted had we enjoyed the advantage of his counsel and guidance in our discussions to-day. I should be the last man in the world to attempt to enter into any

competition with the noble Lord as to the view which his father would have taken upon any private, or indeed upon any public, matter in which his opinions had not been placed upon deliberate record; but, my Lords, I am bound to exercise the right of criticism, and to claim freedom of opinion, on matters on which the views of his distinguished father were placed on record in circumstances of the greatest formality. VIII.

The late Lord Gorell knew the situation perfectly well at the time when he made himself responsible for the Majority Report. He knew well that there was great opposition to the proposals which he recommended to the country. He knew that the Archbishop of York, who was his colleague on that Commission, held precisely the same views as those which the most Reverend Primate indicated in debate a fortnight ago; and, knowing all that, he placed on record his views upon this question in a form which I ask your Lordships, because they express in a penetrating form the underlying principles, to take here and to-day as the final and deliberate formulation of the views which Lord Gorell adopted. I select that paragraph from the Report which is to be found at page 95, in which, speaking on behalf of himself and of the majority of his colleagues, he declared: "That divorce is not a disease but a remedy for a disease, that homes are not broken up by a court but by causes to which we have already sufficiently referred, and that the law should be such as would give relief where serious causes intervene, which are generally and properly recognised as leading to the break-up of married

VIII. life. If a reasonable law, based upon human needs, be adopted, we think that the standard of morality will be raised and regard for the sanctity of marriage increased. Public opinion will be far more severe upon those who refuse to conform to a reasonable law than it is, when that law is generally regarded (as we infer from the evidence) as too harsh, and as not meeting the necessities of life." I find myself wholly unable to believe that the Judge who enunciated this conclusion, founding it upon the experiences of his whole life, and fully alive to the controversies which were as bitterly waged then as they are waged to-day, could have hesitated had he been among us to-night. I, for one, do not believe that that strenuous and fearless mind would have recoiled, in the moment of action and of decision, from the conclusions which he presented to his countrymen in the document from which I have read a quotation.

I would add, my Lords, that I associate myself with what was said by Lord Buckmaster a fortnight ago, when he asked whether the authority of this Commission was to count for nothing. The Government of the day appointed as members of that Commission the ablest men of whom their experience suggested that they could contribute to a solution of this question. They bestowed upon its examination a degree of industry and capacity of which I say boldly that it has never been exceeded by any Commission appointed by any Government. By an overwhelming majority they recommended the conclusions which are before your Lordships to-day. The Minority con-

sisted of three—of the Most Reverend Prelate the Archbishop of York, who stated with the greatest ability, and with as much plausibility as was possible, the view which the Minority Report placed upon record; of Sir Lewis T. Dibden, an ecclesiastical lawyer; and of Sir William Anson, a man whom all of us admired and many of us, who knew him well, loved, but whose life had been perhaps a little secluded from some of the issues which to-day require decision at your Lordships' hands. VIII.

I have to say, speaking in the capacity which to-day I fill in this House, that this Bill concerns two distinguishable topics. The first is indeed important, but it is relatively unimportant. It deals solely with the machinery which the Commission recommended. I do not find myself in agreement with those recommendations, and, consequently, if this Bill is given a Second Reading by your Lordships, I shall take the responsibility of making alternative proposals to those of my noble and learned friend Lord Buckmaster. I do not agree that the County Courts suggested are the best tribunals to decide these matters. I do not agree that the proposals as to Commissioners of Assize are well conceived; still less do I agree with the proposals that the decisions of those suggested authorities ought not to be treated as precedents. I shall, if your Lordships give the Bill a Second Reading, put forward as the subject of discussion alternative proposals which, equally with the proposal of the Commission, will bring facilities of divorce within the reach of those who live in the provinces. But the proposals which

VIII. I shall submit will remit the jurisdiction to the Judges of Assize who go on circuit, and I am happy to be able to inform your Lordships that the Judges of the High Court, with that public spirit which they never fail to show, are willing to undertake that great addition to their burdens if it be the desire of your Lordships that that course shall be adopted. I deal no further at this stage with the machinery, for it is, as I have said, unimportant in relation to the other topics which require decision to-day. If the decision on principle is taken, and if the decision is confirmed by the House of Commons, suitable machinery will be devised by those who are responsible for such matters; and I should therefore, I think, be in error if I took up further time in discussing that which is subordinate.

I come now to what in my view are the fundamental points upon this question. Speaking for myself as an individual Minister, I say that upon the fundamental recommendations, without any qualification whatever, I accept the Report of the Majority, and the purport of the observations for which I ask the indulgence of the House to-night is to recommend the Report of the Majority of the Commission. Here, my Lords, and at the outset, a very important analysis becomes necessary. The real controversy in this House to-day is what the real controversy has been at any given moment for three hundred and fifty years when divorce has been discussed in this House. If we strip away the rhetorical devices, with which every one who has followed the history

of this subject is familiar, it is between those who believe that marriage ought to be indissoluble for any reason and those who do not hold that belief. This is the only controversy on principle. You can create any number of controversies on points of detail, but the only controversy on principle is between those who, if they told you openly and plainly that which they thought and that which they would secure if they had the power, say that for no reason should matrimony, which is a sacrament, be dissolved, and those who do not take that view.

Let me take, for instance, the cases of my noble and learned friend Lord Phillimore, who intervened in the debate a fortnight ago, and of my noble and learned friend Lord Parmoor, who I understand intends to address your Lordships to-night. I know Lord Phillimore's views even more clearly than I know Lord Parmoor's, because I had the advantage of hearing him express them a fortnight ago. If I do an injustice to the views of my noble and learned friend I most expressly invite him to make them plain when he comes to address you. As I understand the views of those two noble and learned Lords—I did not clearly gather what was the view of the Most Reverend Prelate the Archbishop of York on this point—both of them, if at this moment they had the power, would turn the clock back and would restore the law to the condition in which it was over three hundred years ago, and would enact that on no ground whatever should marriage be dissolved.

I have this observation to make upon their

VIII. attitude and upon the attitude of those who share their views. They are unsafe guides in this question. They and those who think with them have been driven out of the adultery entrenchment partly by St. Matthew and partly by the invincible determination, not of the Church in this country, but of the laymen of this country as asserted for a period of more than three hundred years. I have this criticism to make, that he who is against every ground for divorce becomes a special pleader when he argues on individual merits against a particular ground of divorce. He is surely an unsafe counsellor when he begins an examination and a dissection of grounds put forward in an individual case by saying "I am against any ground." He says, in effect, "You cannot state any conceivable ground which I will not oppose, and yet when you state six or seven grounds I pretend to examine each of those in relation to the individual merits of the proposal."

In my view the history of the matter has very great importance. The Act of 1857, far too late in my view, removed a jurisdiction from the Ecclesiastical Courts which—I say it with all respect—they were ill-fitted to discharge. Their view was that marriage was and ought to be indissoluble. *Naturam expellas furca, tamen usque recurret.* The Ecclesiastical Courts themselves, which laid down this doctrine with every circumstance of canonical formality, prayed in aid a number of fictions under the head of nullity which were comparable to the chicanery which disfigures our law to-day. I pass by the conjugal eccen-

tricities of Henry VIII. with the observation that they met with a good deal of indulgence from the ecclesiastics of that day, and I come to the latter part of the seventeenth century. Towards the end of the seventeenth century it was recognised that, by the procedure of a private Act of Parliament, divorce ought to be obtainable on the ground of adultery. It is hardly necessary to say, having regard to the age with which I am now dealing, that this was a method of relief which was open to the rich and open to the rich alone, and it is a great reproach to our institutions over so long a period of time that when once it was recognised that divorce ought to be conceded on the ground of adultery a dividing line should have been drawn between rich and poor. One method, and one method only, was recognised; and that was a method which was open only to the rich, and which by universal admission repelled the poor. But so it was. The principle from that moment disappeared. The principle that marriage was and ought to be indissoluble was excised with almost universal approval from our institutions three hundred and fifty years ago. We therefore to-day approach it upon the basis that marriage is not, and ought not to be, treated as being indissoluble; and I say with the utmost plainness that those who take and who attempt to advocate the other view do not live in this world; their arguments are the whisperings of the abandoned superstitions of the Middle Ages. VIII.

I assume, and I think I am entitled to do so, that ninety per cent of your Lordships who listen

VIII. to me to-night, ninety per cent, I believe, of those who are members of the House of Commons, and I think as large a proportion of the total population of these Islands, are agreed that upon some grounds (and I will discuss in a moment what those grounds should be) marriage ought to be dissoluble. That means—and let us never forget this—the definitive rejection of the ecclesiastical view. When once that conclusion is reached, on what other principle must we proceed? The Commission indicated the principle. I accept it. I recommend it to the consideration of the House. They laid it down that marriage ought to be dissoluble upon any grounds which have frustrated what by universal admission are the fundamental purposes of marriage.

I have said that I accept that principle. But this has never in the Temple of Truth been the ecclesiastical case. Their case has been one which, speaking again quite plainly, has been adopted under the influence of an almost unconscious opportunism—the case, namely, that although marriage is not otherwise dissoluble it may nevertheless be dissolved in cases where adultery has been committed. I, my Lords, can only express my amazement that men of saintly lives, men of affairs, men whose opinions and experience we respect, should have concentrated upon adultery as the one circumstance which ought to afford relief from the marriage tie. Adultery is a breach of the carnal implications of marriage. Insistence upon the duties of continence and chastity is important. It is vitally important to society. But I have always taken the view that that aspect

of marriage was exaggerated, and somewhat crudely exaggerated, in the Marriage Service. I am concerned to-day to make this point, by which I will stand or fall, that the spiritual and moral sides of marriage are incomparably more important than the physical side.

This question is fundamental, and I invite your Lordships to consider it with the greatest earnestness. It seems indeed to me that there can be no doubt as to which is the higher and the more important side of marriage. If we think of all that marriage represents to most of us—the memories of the world's adventure faced together in youth so heedlessly, and yet so confidently; the tender comradeship, the sweet association of parenthood—how much more these count than the bond which nature, in her ingenious teleology, has contrived to secure, and render agreeable, the perpetuation of the species. I do not know whether one of your Lordships would be bold enough to say that the physical side of marriage is the highest. I greatly doubt it. I do not think that the Most Reverend Primate the Archbishop of Canterbury, who, I believe, is to follow me in this debate, would for one moment, if dialectically he were a free agent, lend the weight of his authority to the position that the physical side of marriage is the highest. And yet be this observed, that those who oppose this Bill must say that, and for this reason, that if they say that the physical side of marriage is not the highest, they are committed to this monstrous and mediæval paradox that they assent to divorce for a breach of the less important obligations, and they

VIII. deny divorce for a breach of the more important obligations of marriage. I conceive this to be an insult to the spiritual and sacramental conception of marriage; and it is just because I place other elements in the married state far, far higher than I place the physical relationship that I make this fundamental in my argument. I specially desire that any answer to that argument may deal with this point, that a breach of that which is higher must be treated by the State as not less grave than a breach of that which is lower.

With those words of preface I come to the ground upon which it was suggested by the Majority of the Commission that divorce might be conceded in addition to the case founded upon adultery. The first of those, as your Lordships know, is wilful desertion for three years. I pause here to ask particularly of any noble Lords who take the other view whether or not they conceive that it is a graver violation of the obligations of marriage that a man or woman should wilfully desert his wife or her husband for three years, defying every obligation to which he or she has solemnly sworn in the Marriage Service, than that he or she should yield to one fugitive, physical temptation. Consider the consequence of this desertion and apply it—because the case is more moving, and therefore more suitable for my immediate argumentative case—apply it to the case of a deserted woman, and examine that case, immensely increased as it is in range and importance by the experience of the war, in relation to the thousands of women who married soldiers from overseas during the war, and who have

been deserted by those husbands since the war broke out.

They have no means of tracing their husbands. If they were rich women the whole machinery and resources of the law would be open to them. If a woman of wealth and position had married any man who, a month after the marriage, had abandoned her, she would be able without any difficulty to discover his whereabouts. She can discover and can prove that he has committed that adultery which, coupled with desertion, would give her relief. What is the remedy open to a poor woman who, perhaps, when she married gave up the pitiful pursuit by which she made her living before her marriage, and, relying on that marriage, is left penniless for the whole of her life, unable to identify her husband, unable to obtain the slightest relief from the law. She is neither wife nor widow; she has a cold hearthstone; she has, perhaps, fatherless children for the rest of her life. There are thousands and tens of thousands of people who at this moment are in this very position. I know that it is not the intention of those who oppose this Bill to encourage adultery. But knowing this I marvel at their attitude.

In the cases which have come to me within the last fortnight, if I had time to deal with them I could give your Lordships particulars which would reinforce my argument by emotion. What is a young woman of twenty-two to do, who is left for the rest of her life with no hope of alleviation in the future, with a fugitive husband whom she never can identify, while the law says to her plainly, finally, and brutally, We will do nothing for you?

VIII. Then it is said, You have open to you judicial separation. I think it is a mordant irony that the Church should have found itself impelled to support a state of affairs which really means this, that in every one of these cases the only alternative to the proposals of this Bill is a state of judicial separation. Choosing my words advisedly, and being prepared with chapter and verse of a hundred cases even at the date when the Royal Commission reported, and in a thousand cases since, I say that I can prove that this state of judicial separation—admittedly the only alternative—is a hotbed of vice. We are told that such a woman as I have described is to remain chaste. I have only to observe that for two thousand years, to take the chronology of Christendom alone, human nature in the warmth of youth has repelled these cold admonitions of the cloister; and I for one take leave to say with all reverence, that I do not believe that the Supreme Being has set human nature a standard which two thousand years of Christian experience has shown that human nature, in its exuberant prime, cannot support.

What universally happens? What happens in case after case reported upon by the Commission? Do not at least let us delude ourselves; let us face the facts. I will tell your Lordships what it means, and I challenge contradiction on this point. It means that new connections are formed; it means that, in the overwhelming majority of the cases, the man or the woman who is deserted in the circumstances described enters into adulterous relations with

others. In some cases the moral declension and the succession of adulterous relations which one would expect follows; in other cases a monogamous union is formed, which is necessarily of an adulterous character, but in which the parties remain faithful to one another. Now, I ask those who oppose this Bill and who support, by doing so, this state of affairs, whether they are quite sure that the Legislature is not to-day responsible for all these adulterous unions and for all the consequences of these adulterous unions? Observe one consequence which every one realises. Many of these persons have feelings of a great and very laudable dislike to bringing into the world illegitimate children. What is the result? Let it be plainly stated, because these matters cannot be too plainly stated. There are thousands of English men and English women at this moment, in the prime of their lives, who ought to be contributing to the child-strength of the Empire at a moment when the very future of the Empire may depend upon the sufficiency of a virile population. Those people are condemned to sterilise their union because they will not bring into the world illegitimate children under the system under which the Legislature has condemned them to live. If this alone were the argument which was presented under this head it would at least be a formidable one. Those thousands of people, now living their lives in circumstances in which they see no gleam of hope, come to-day before your Lordships to ask for mercy and for justice.

When we were told by the Archbishop of York

VIII. a fortnight ago that great mischiefs may follow upon the proposals contained in this Bill, I demand, and I have a right to demand, that we shall have it precisely explained, first, what those mischiefs are, and, second, whether it is maintained that they are greater than the mischiefs which we see around us to-day. The question is a comparative one. We are not formulating or dealing with a new heaven; we are dealing with an old earth in which horrible sufferings are proceeding before our eyes. We must compare these things and make a balance; and I say plainly that I reject utterly the prediction—with the most profound respect but nevertheless utterly—made by the Archbishop of York. I am astonished that he should not have felt it necessary in his speech to deal with the case of Scotland, desiring, as he did, to persuade your Lordships that if this particular modification were permitted—if, in other words, relief were given in the case of desertion for a period of three years—those mischiefs which he predicted would follow.

The Archbishop of York was fully aware of the evidence from Scotland. It was produced before the Commission; it was examined; it was analysed. In the year 1573 Scotland adopted in the main the system which I am recommending to your Lordships to-night. If those mischiefs which we are told will follow upon this system are to arise in this country, how is it they have never risen in Scotland? This matter was dealt with most elaborately. Evidence was given by a very distinguished Scottish Judge upon this—

Lord Salvesen—and no one could have a greater acquaintance with this subject or could have spoken with greater authority. This is a summary of his evidence given on page 97, in paragraph 250 of the Majority Report : VIII.

" The number of decrees of divorce, granted in Scotland for adultery from 1898–1908 and for desertion during that period respectively, are given by Lord Salvesen, from which it appears that the total number of decrees for desertion is less than the total number of decrees for adultery. Lord Salvesen says that, relatively to the population, there has been a decrease in the aforesaid ten years. There appears to be nothing in these tables to justify the fears of those who fear the effect of divorce being granted for desertion. On the contrary, while these decrees on the ground of desertion have no doubt remedied very serious grievances, no abuse of this right appears to exist, nor does there seem any reason to suppose that any abuse of it would be found in England."

That is the evidence of a Scottish Judge of the greatest experience, who lived the whole of his life under that system which the Majority of this Commission recommended for the adoption of this country. And I am at least entitled to say that those who oppose these proposals ought to give some reasons for opposing them ; they ought to give some reasons why there is such a fundamental difference on sexual and social matters between the Scottish nation and the English nation that proposals which have not produced the mischiefs which they predict in the case of Scotland should produce them in the case of

VIII. England. The onus is evidently on those who oppose. Let them discharge it.

I come to, and will deal briefly with, the issue of cruelty. Here again I must economise what I have to say, because the subject is long, and therefore I select two cases which are illustrative. I take the first case, most abundantly vouched for by illustrations in this volume, in which it is admitted that the wife cannot go on living with her husband without running a risk to limb and life; in which, in other words, the proved and savage violence of the husband is such as to make every moment which she lives with him dangerous to her health and life. And I have taken as the second case, the case of a husband who has knowingly or negligently given venereal disease to his wife. I suppose there is nobody listening to me who would be bold enough to claim that the wife ought to go on cohabiting with her husband when it is indisputably established that such continued cohabitation may endanger her life. It is, of course, unarguable; and equally, I suppose, it will not be contended that any woman ought to go on living, or ought to be expected to go on living, with her husband after she has been knowingly or negligently infected by him with venereal disease. Suppose she does not cohabit with him, suppose she accepts what I anticipate will be your Lordships' view that she ought not to go on cohabiting with him, what does that mean? It means that a woman, possibly just married, has to embark upon a life in which she lives alone, under every conceivable temptation, and with no one to protect her.

As to the consequences of such a fate, I would ask your Lordships to listen with deep attention to a passage quoted with warm approval in the Majority Report. I am reading from the bottom of page 91 with reference to judicial separation. VIII.

" This proceeding, neither dissolving the marriage, nor reconciling the parties, nor yet changing their natures ; having, at least, no direct sanction from Scripture ; characterised by Lord Stowell as casting them out ' in the undefined and dangerous characters of a wife without a husband, and a husband without a wife ' ; by Judge Swift " [an American judge] " as ' placing them in a situation where there is an irresistible temptation to the commission of adultery, unless they possess more frigidity or more virtue than usually falls to the share of human beings ' ; by Mr. Bancroft " [the historian of the United States] " as punishing ' the innocent more than the guilty ' ; by an English writer " [Macqueen] " as ' a sort of insult, rather than satisfaction, to any man of ordinary feelings and understanding,'—is, while destitute of justice, one of the most corrupting devices ever imposed by serious natures on blindness and credulity. It was tolerated only because men believed, as part of their religion, that dissolution would be an offence against God ; whence the slope was easy toward any compromise with good sense ; and as the fruit of compromise we have this ill-begotten monster of divorce *a mensa et thoro*, made up of pious doctrine and worldly stupidity."

Yet that is all that is offered in such a case as I have supposed.

VIII. The Most Reverend Prelate the Archbishop of York said that it was very difficult to define cruelty. Let me inform the Most Reverend Prelate that while almost all definitions are difficult there is no definition which it exceeds the resource and the ingenuity of the law to make, and if it be the policy of Parliament where a case of cruelty of the kind which I have described is established, that that circumstance shall constitute a ground of divorce, we shall find no difficulty in formulating a definition which will be sufficiently lucid for the guidance of the Courts. I would add this for the further reassurance of the Archbishop, that the conception of cruelty will be examined much more closely by the Law Courts when we are divorced from our present unreal system of law. When cruelty is a substantive ground, instead of being a fragment of the composite circumstances under which the escape is sought to-day, the Judges, in my opinion, will apply their mind to its definition and elucidation under circumstances which will be incredibly easier.

I come now to the ground which deals with the case of a lunatic who for five years has been in confinement under the Lunacy Law. That case affects almost 40,000 people. In other words, there are living in these islands, our fellow-subjects, nearly 40,000 people who find themselves at this moment tied to lunatics, of whom in almost every case it must be pronounced that they are incurable. The Archbishop of York asked your Lordships to say that with the advance of science it becomes almost impossible to say

that some cure may not be discovered. My Lords, this consolation, to any person who has been tied by the bond of marriage to one who for five years has been certified insane, offers particularly cold comfort.

It is quite true, as the noble and learned Lord, Lord Buckmaster, and also I think the Archbishop, said, that in this case it is not the fault of the lunatic that his mind has been destroyed. But this distinction proceeds on an entirely fallacious basis. Decrees of divorce are not distributed on the basis of reward or of punishment. Divorce is granted in obedience to profound considerations of social policy, and whether the unsuitability for the obligations of marriage be moral, or physical, or mental, the consequences are and must be the same. In thousands of cases the lunatic has not the slightest conception that he is married at all, and the proposition is gravely put forward that a man or a woman who is married to a spouse who has been seized by this melancholy and incurable affliction to such an extent that the man or the woman is utterly unconscious of the fact that he or she possesses a spouse, must nevertheless remain tied to him or her for life. One tragic case is within the knowledge of all your Lordships. I mention no names, nor should I have even mentioned the case, had not the noble lord affected made it public in the Courts. But there was the case of the bridegroom who discovered, I think at the church door, that his wife was mentally affected. Some twenty or thirty years ago that discovery was made. The whole happiness of his life was

VIII. irretrievably destroyed, and the promise of a noble house extinguished for ever. One day I suspect that men will wonder how we sustained for so long a system so savage in its conception and so poignant in its consequences.

My Lords, I can shortly say all that requires special statement in relation to habitual drunkenness. Here it is proposed that after a separation order has been made on the ground of drunkenness, and where drunkenness has continued for three years after the separation order, it shall be made a ground for divorce. I will ask your Lordships to consider what the Commission said upon that point. They said :

" It seems probable from the evidence given before us that habitual drunkenness produces as much, if not more, misery, for the sober partner and the children of a marriage, as any other cause in the list of grave causes. Such inebriety carries with it loss of interest in surroundings, loss of self-respect, neglect of duty, personal uncleanliness, neglect of children, violence, delusions of suspicion, a tendency to indecent behaviour, and a general state which makes companionship impossible. This applies to both sexes, but in the case of a drunken husband, the physical pain of brute force is often added to the mental and moral injury he inflicts upon his wife ; moreover, by neglect of business and wanton expenditure, he has power to reduce himself and those dependent upon him to penury. In the case of a drunken wife, neglect of home duties and the care of the children, waste of means, pawning and selling possessions, and many

attendant evils, produce a most deplorable state of things. In both cases the ruin of the children can be traced to the evil of parental example." VIII.

See what that means. It means that where two people marry—and these particular evils, in their most aggravated forms, occur in all strata of society — they marry often enough, in the phrase of Bentham, " children blinded by love," and then there comes disillusionment, when the woman or the man finds that she or he has married one who is in fact by reason of incurable drunkenness an unsexed beast. Society and the Church say to a young wife in this position, " Get your separation order, and having got your separation order live for three years alone; support yourself if you cannot get support from the drunkard," and to such a woman when she has undergone these three years of harrowing anguish they say, " You shall have no further relief, but for all your life you shall be tied to such a man." Those who have spoken in opposition to the present proposal say, with the best motives, but with malignant results, " We deny you any hope in this world. Though an honest man loves you, sin shall be the price of your union, and bastardy shall be the status of your children." My Lords, I cannot and I do not believe that society, as it is at present constituted, will for long acquiesce in a conclusion so merciless.

One cause only remains—the cause of imprisonment under a commuted death sentence. In the year 1910 I think that there were 113 cases of those who were imprisoned for life, subject

VIII. to relaxation under a commuted death sentence, and it would be reasonable to assume that of those 113 cases 75 were married. The Most Reverend Prelate, in dealing with this cause, said he did not examine it because it was a case that did not very frequently arise. I should myself have thought it was hardly right to count heads in a matter of right and wrong. What does the State say to the spouses of those who have committed capital offences and who are imprisoned for the rest of their lives. The State is to say, apparently, "True, your spouse committed an offence which caused him to be sentenced on the capital charge. True it is only by the indulgence of the State, which has commuted that capital charge, that you are not discharged from the obligations of matrimony and free to marry again. But, after all, there are so few of you that we do not think it necessary to make any change." My Lords, I profoundly believe that Justice is not to be measured in any such detestable scales.

Then there is the case of the children. It is said that those who advocate these changes ignore the case of the children. If we ignored the case of the children, which, though not quite the highest consideration, is almost the highest consideration, we should indeed not be deserving of the support of Parliament in these measures. But it is ludicrously untrue to say that our proposals ignore the case of the children. I say boldly on the other hand that the case of the children is the strongest part of our proposals, and if you compare their state under the system which exists before our eyes to-day and the state

of the children as it would be if these proposals were accepted, no reasonable man could doubt as to where the balance of advantage lies. We shall remove under this proposal the children from contact with the spouse who from moral or physical taint is unfit to sustain the obligations of marriage. Their plastic and impressionable minds will be withdrawn from squalor and immorality, from drunkenness and crime, and they will be afforded a chance at least of happy homes and useful citizenship. What mind is so callous as not to shudder that a child shall be condemned to live in a house in which its mother spends a life of open adultery and in which its brothers and sisters, if such are born, must be named bastards. Such surroundings are to be found in thousands of homes all over the country to-day. And when we talk of the fate of the children under our proposals, let us not forget what is their fate to-day.

I have said at undue length all that is in my power to influence your Lordships in a decision which I regard as momentous in the social development of this country. Your Lordships have undertaken the burden of examining this question at a moment when it may be that the initiative, having regard to other commitments, could not have been taken in another place. It may well be, if your Lordships send down this Bill, that in another place it will meet with a volume of support which will at long last remove this great blot from our civilisation. I would most earnestly implore your Lordships to be the pioneers in this great reform; and if it should prove so to be,

VIII. I believe that daily and nightly your Lordships' names will be breathed with unspeakable gratitude by thousands of the most unhappy of your fellow-subjects, and, I am sure of this, that by generations yet to be you will be acclaimed for the wisdom and humanity of the decision taken to-night.

# IX

## LAWYERS AND THE GREAT WAR



NEVER before in the history of this country has the whole community united with more self-sacrificing zeal for the general good than in the Great War. It would be invidious to claim for any one section or class more merit than is due to others. Where all bore their share in the common task the glory and honour belongs to all. Nevertheless, it is fitting that the services of each profession or calling should separately be recorded, not to enhance their merits over those of others, but so that the part played by each in the War may be seen in proper perspective when the energy called forth by the emergency is considered as a whole.

In undertaking the task of describing summarily and in outline what the profession of the law did in furthering the cause of the Allies, I deal with their services under three heads :

1. The Councils of the State.
2. His Majesty's Forces, and
3. Other Services.

Before doing so, however, I think it desirable to dissipate certain well-known misconceptions about lawyers and their part in national life.

IX. It is a habit of certain individuals to decry lawyers persistently in season and out of season. Some appear to condemn them utterly as an incumbrance, useless to the national well-being. Others, more numerous and equally shortsighted, limit their sneers to those lawyers who take part in political life. The former hardly need refutation. They are mostly people who do nothing, however unimportant, without consulting their legal advisers, and resent the consequent heavy expense, without giving any thought to the fact that they incur the expense in order to save themselves the trouble of managing their own affairs. Many, too, are ignorant of the work of the profession, and express prejudice natural to people who do not appreciate knowledge which they themselves lack.

The latter and more numerous class of critics are not entirely without some justification by way of specific instances. There have been, and no doubt always will be, among lawyers, as well as among all others who take part in politics, individuals who enter for their own personal ends, and choose their opinions, not because they believe in them, but because they consider a public profession of such opinions would be likely to further their ambitions. Every class of the community affords examples of such persons, and the law is no more exempt and no more liable to reproach than any other profession. Lawyers are, however, more subject to the accusation than any. The obvious reason is that in their practice they speak for their clients, and their client's cause is independent and superior

to their own personal opinions. As their work is in some measure conducted in public in open Court, superficial observers, who fail to realise the reasons, drawn from considerations of public welfare, for the known fact that lawyers need not personally believe in their client's cause, affect to believe that they hold this professional rule as a rule of private conduct. No suspicion could be more false and superficial. IX.

This prejudice was sometimes in the past expressed by or on behalf of people who believed that politics were their exclusive affair by reason of their birth or wealth, and thought that their right was independent of the intelligence and anxious thought essential to any political office, however unimportant; it is not surprising that they should have been frequently annoyed by the apparent ease with which many lawyers have attained eminence in the Councils of the State. They were, of course, equally disconcerted by any obscure layman who bade fair to attain political eminence; but in such a case their envy was manifested by attacks on the man himself; his profession was not, as a rule, treated as an aggravation of his offence.

To-day this particular criticism usually proceeds from hysterical and very political journalists. The most curious feature is that persons who suffer from this particular form of prejudice not infrequently regard as their political inspiration some lawyer who holds the same views on politics as themselves. Rather than be exposed as bankrupt in thought, they are, as it were, content to borrow it from a tainted source. The fact is that

IX. prejudice of this kind is the way in which people, who for one reason or another are dissatisfied, express their annoyance, preferring rather to publish their opinions in the form of a facile but erroneous conclusion than to search carefully for the true cause of their anxiety or discontent. There is, after all, no profession whose members are trusted with more confidence than that of the law.

There is another fallacious opinion as to the true function of lawyers which is not so often expressed but is more often found in the conduct of affairs of State. This is more true of the Central Powers than of any other country, and has a close connection with the theory of the state which led in no small degree to the outbreak of the War. I refer to the impression that the State has only the same use for a lawyer as a private client who, while seeking legal advice and assistance, remains master of his own affairs, free to follow or disregard such advice if he pleases. It must be obvious that in many matters the State is in the position of a client, and in all countries there are Counsel for the Crown who act for the State just as if the State were a client. But that does not conclude the matter. The State relies upon the political services of all its citizens. All citizens are entitled to rise to such eminence in politics as their merits or opportunities render possible. As citizens, their occupation, whatever it may be, is no obstacle. In Parliament the member, whatever may be his method of earning his livelihood, is present as the representative of his constituency. The State has need of the legis-

lative activities of all classes, and none the less of lawyers, who are, as a rule, better qualified than others to assist in devising amendments or additions to the law, in the administration of which it is their business to co-operate. Their lives are spent in striving to solve problems which touch upon every aspect of administrative, business, and social life, and their experience renders them peculiarly fitted to undertake the solution of problems which constantly confront the statesman in new and unfamiliar aspects. The success of lawyers in Parliament is due to the fact that their training is analogous to that of a statesman, and the transition is therefore easier for them than for others. Only once has it been thought desirable to exclude lawyers from Parliament; the Parliament which enjoys the epithet of unlearned at once demonstrated the indispensability of lawyers; and the experiment has never been repeated. The fact is that a legal training cannot make a statesman of a person who by nature is unfitted for politics, but, other things being equal, a man who is so fitted is better equipped if he has a legal training than if he has not.

In this realm lawyers have always taken a foremost position in every constitutional conflict, and have contributed in no small measure towards the establishment and maintenance of the fundamental rule of political liberty that the law must be supreme. Here the rule is so universally admitted, and so automatically applied, that we are apt to forget that this indispensable guarantee of our liberties is not universally

IX. conceded, and, in forgetting that, to ignore the indispensability of lawyers in securing that guarantee. Though "the King can do no wrong," his ministers and servants may, and the lawfulness of their actions may always be challenged in a Court of Law. We are not supple in obedience to the changing dictates of an autocrat or ruling caste, and still less to the decrees of an unimaginative bureaucracy, and require to be reminded that our free access to the Courts is due to the supremacy of the law.

The characteristic distinction between the Allies and the Central Powers lay in their differing conceptions of the province of law and the functions of lawyers. Among the Central Powers the law was applied universally as between subjects, but when subjects came into conflict with the State different considerations sprang into play. The sphere in which law was supreme was circumscribed. In the political arena, where authority came into contact with the rule of law, it was not admitted that in case of conflict the law necessarily prevailed. Law was in some degree considered as the handmaid of the State and the Courts as instruments of authority. Lawyers were trained to believe that the needs of the State might transcend the law, and to abase themselves before authority. A trivial example may assist the understanding of this. In Germany the law known as majestätsbeleidigung (*lése-majesté*) does not very materially differ from our own law, and the judges, like our own, hold office *quamdiu se bene gesserint*. Yet it is well known that before the War the German

had to be extremely careful, because his lightest remark, if taken exception to by even the most subordinate official, might easily lead to a conviction. Soon after the formation of the Empire the judges did indeed decline to convict in such trivial cases, but they were swiftly made to realise that such a refusal was regarded as misconduct; and even if it did not, as sometimes happened, lead to removal, they were not likely to receive any further promotion, and so, realising this, they bowed before the views of the officials. True political life cannot exist when political discussion is not free. IX.

In Germany the lawyer was in practice limited to the function of subordinate adviser, and the result of the conception of the State in regard to the law led to the acknowledged poverty of the Empire in statesmen of political ability. All-powerful authority is not prone to reason; it crushes. There was no inherent reason why the people of Germany should not have developed a genius for politics and produced true statesmen. When, however, the principle that the law shall prevail was regarded as being subject to exception where the State was concerned, the protection it affords was denied where it was most needed. Political thought in Germany grew like a cancer round the doctrine that the needs of the State transcend all law and justify the breach of any impediment, even of honour. Von Bethmann-Hollweg, when he referred to the "scrap of paper," was by no means committing a mere indiscretion. It was the logical application of the principles upon which all Germans were nurtured, that no

IX. obstacle, legal or moral, can be permitted to frustrate the will of the State. It is obvious that to a man of his training the Treaty, which represents the ordinary law, would be valueless if it conflicted with what was a matter of vital importance to Germany. It was to him in actual truth no more than a scrap of paper. The War, therefore, has rightly been described as having been waged by the Allies in order to establish the rule of law among nations, that no doctrine or theory of the State shall be allowed to enable any nation to disregard its obligations or to pursue its ambitions without regard to the just rights of other countries.

It is therefore not surprising to find associated with the abject poverty of the Central Powers in the realm of politics a remarkable absence of lawyers in the Councils which directed their destinies. It is no doubt true that many lawyers have held office, especially in Austria, where Cabinets of administrators have often been formed to carry on the business of State when a Cabinet in the usual sense could not be formed, but it is an undoubted fact that their theory of the province of law and their conception of the function of lawyers are intimately connected with that practice and precept in matters of state policy which earned them the contempt of the civilised world.

Among the Allies, on the contrary, regard for law was on a higher plane. Amongst us the rule of law is regarded as a sacred principle, and rights are not to be distorted or subverted by the actual or supposed interests of State. There is

no way of altering or disregarding the law on the ground of policy except by recourse to Parliament, where the alterations and the reasons for proposing them are open to examination and criticism. Unless and until such an alteration is made by the appropriate constitutional means, an individual who insists upon his rights must be allowed to enjoy them, however wrongheaded he may be and however harmful his insistence to the interests of the State. Reasons of policy are arguments for an alteration of the law in due form; they cannot be adduced to set the law aside. No Court will uphold the views of the Government or of its officials unless convinced that they are in accordance with the law. Even the activities of a Government servant in his own office, and in relation to his allotted functions, can be made, if need arise, the subject of a complaint to the Courts.

This conception of the province of law is associated with a marked disposition to call lawyers to fill the high offices of State. The tendency has never been more strongly exemplified than during the War, for the Allies instinctively felt that the burden of defending and maintaining the freedom of the world was a trade which, while needing to the utmost the combined efforts of all, made a peculiarly insistent demand upon the services of lawyers. Indeed the Prime Minister, or analogous Minister, of the Allied countries was in nearly every case a lawyer, and the various War Cabinets contained many of that profession. In France the President, M. Poincaré,[1] had, before his election,

[1] Now Prime Minister.

IX. enjoyed an extensive practice as an advocate. Mr. Woodrow Wilson, who was President of the United States, was trained as a lawyer, though he gained his reputation in academic positions, and since demitting office has resumed, it would appear, some degree of legal practice. In this country both Prime Ministers during the War were lawyers : Mr. Asquith, a barrister, and Mr. Lloyd George, a solicitor.

It would be tedious to justify by tabular statements of the various Cabinets the statement that lawyers have occupied prominent positions in every War Cabinet of the Allies, but it is interesting to record some examples which will serve as a fair representation of the detailed particulars.

During the War the government of Belgium was entrusted to a National Cabinet which carried on the administration under circumstances of extraordinary crisis, far exceeding in a variety of ways the difficulties of the Allies. In that Cabinet no less than eleven advocates held office: MM. Cooreman, Président du Conseil ; Henri Carton de Wiart, Ministre de la Justice ; Renkin, Ministre des Colonies; P. Poullet, Ministre des Arts et des Sciences ; P. Hymans, Ministre des Affaires Étrangères ; Van de Vyvere, Ministre de Finance ; P. Seghers, Ministre des Chemins de Fer, de la Marine et des Postes ; A. Hubert, Ministre du Travail ; P. Berryer, Ministre de l'Intérieur ; E. Vandervelde, Ministre de l'Intendance ; and E. Brunet, Ministre sans portefeuille.

In France the organisation of the legal profession is on a different system from that of this

country. There is no one Bar to which all barristers belong, and consequently it is not easy to say what offices were held by members of the provincial Bars. The President of the Republic, M. Poincaré,[1] is a barrister, and the following members of the Paris Bar held Cabinet rank during the War: MM. Millerand, Viviani, Briand, Steeg, Ribot, Klotz, Guist'hau, Léon, Berard, L'Hopiteau, and Sarraut. IX.

Italy experienced several changes of Cabinet, and no less than 22 advocates held Cabinet rank, including such well-known statesmen as Sigg. Nitti, Orlando, and Salandra.[2]

Lawyers have always enjoyed the trust and confidence of the citizens of the United States, who have on many occasions called on them to hold the chief offices of State. During the War the most important positions were held by lawyers, who occupied the responsible offices of President, Vice-President, and Speaker of the House of Representatives. President Wilson's Cabinet included many lawyers—both the holders of the position of Secretary of State and the Under Secretary, the Secretary and Assistant Secretary of the Treasury, both the successive Secretaries of War, the Secretary and Assistant Secretary of the Navy, the Secretary of the Interior, the Postmaster-General, and the Attorney-General.[3]

[1] Now Prime Minister.

[2] The complete list is Sigg. Baccelli, Barzilai, Berenini, Colosimo, Comandini, Chimienti, Daneo, De Nava, Dari, Da Como, Fera, Facta, Grippo, Girardini, Meda, Nitti, Orlando, Riccio, Balandra, Sacchi, Scialoja, and Villa.

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| President . . . . | Mr. Woodrow Wilson. |
| Vice-President . . . . | Mr. Thomas R. Marshall. |
| Speaker of House of Representatives | Mr. Champ Clark. |

IX. The Commander-in-Chief of the American Expeditionary Force, General John J. Pershing, is a qualified lawyer.

The British Empire also called upon many lawyers to hold Cabinet rank during the War. Each of the three Cabinets in office in the United Kingdom during the War included, besides the Prime Minister, a number of barristers and solicitors. Their names and offices are so accessible in many works of reference that it is unnecessary to give a detailed list. The same is true of the Dominions. In Canada 17 lawyers, including the Rt. Hon. Sir Robert Borden, Prime Minister, and the Rt. Hon. Arthur Meighen, his successor, were included in the Borden Administration.[1]

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| Secretary of State 1 | Mr. Wm. Jennings Bryan, |
| Secretary of State 2 | Mr. Robert Lansing. |
| Under Secretary of State | Mr. Frank L. Polk. |
| Secretary of the Treasury | Mr. Wm. H. McAdoo. |
| Assistant Secretary of the Treasury | Mr. R. C. Leffingwell. |
| Secretary of War 1 | Mr. Lindley M. Garrison. |
| Secretary of War 2 | Mr. Newton D. Baker. |
| Secretary of the Navy | Mr. Josephus Daniels. |
| Assistant Secretary of the Navy | Mr. Franklin K. Roosevelt. |
| Secretary of the Interior | Mr. Franklin K. Lane. |
| Postmaster-General | Mr. A. S. Burleson. |
| Attorney-General | Mr. T. W. Gregory. |

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| Prime Minister and Secretary of State for External Affairs, 1914–18 | Rt. Hon. Sir Robert Borden, G.C.M.G. |
| Minister of Finance, 1914–18 | Sir Thomas White, K.C.M.G. |
| Minister of Marine and Fisheries and Naval Affairs, 1914–17 | Sir James D. Hazen, K.C.M.G. |
| Minister of Justice, 1914–18 | Rt. Hon. C. J. Doherty, K.C. |
| Minister of Labour, 1914–17 | Hon. T. W. Crowthers, K.C. |
| Minister without Portfolio, 1914–1918 | Sir James Lougheed, K.C.M.G. |
| Secretary of State, 1914–15 | Hon. Louis Coderre, K.C. |
| Postmaster-General, 1914–16 | Hon. T. Chase Casgrain, K.C. |

Australia called two Cabinets into office, the Cook Administration, which existed from 24th June 1913 to 17th September 1914, and the National War Government, under the Rt. Hon. W. M. Hughes, which succeeded it and has continued in office since that date. In the former Government there were six lawyers out of ten members; in the latter, four.[1] The other Dominions included lawyers in their Cabinets, but I will only mention two names. General

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| Minister of Interior, 1914–17, and Postmaster-General, 1917–18 | Hon. P. E. Blondin. |
| Minister without Portfolio and S.G., 1915–17, and Minister of Interior, 1917–18 | Rt. Hon. A. Meighen, K.C. |
| Minister of Inland Revenue, 1917–18 | Hon. Albert Sevigny, K.C. |
| Minister of Customs and Inland Revenue, 1917–18 | Rt. Hon. A. L. Sifton. |
| Minister of Immigration and Colonisation, 1917–18 | Hon. J. A. Calder. |
| President of Privy Council, 1917–1918 | Hon. N. W. Rowell, K.C. |
| Minister of Militia and Defence | Major-Gen. the Hon. Sir S. C. Mewburn, C.M.G. |
| Minister of Public Works, 1917–1918 | Hon. F. B. Carvell, K.C. |
| Minister without Portfolio, 1917–1918 | Hon. A. K. Maclean, K.C. |

[1] *Cook Administration*—

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|---|---|
| Attorney-General | Hon. W. H. Irvine, K.C. |
| Department of External Affairs | Hon. P. M. Glynn, K.C. |
| Department of Trade and Customs | Hon. L. E. Groom. |
| Postmaster | Hon. A. Wynne. |
| Vice-President, Executive Council | Hon. J. H. McColl. |
| Hon. Minister. | Hon. J. S. Clemons. |

*National War Administration*—

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|---|---|
| Prime Minister and Attorney-General | Rt. Hon. W. M. Hughes. |
| Minister for Works and Railways | Hon. L. E. Groom (from March 27, 1918). |

IX. Smuts, whose distinguished career was commenced by the highest academic success as a law student at Cambridge and subsequently as a practising lawyer until he took up arms against us in the Boer War, attained the rank of General both in the Transvaal Army and in H.M. Forces; and Sir John Salmond of New Zealand, who before entering upon a political career was a professor of law of great eminence, whose works on jurisprudence and torts have earned a great reputation throughout the world. He is now one of the delegates to the Washington Conference.

The outbreak of war coincided with the commencement of the Long Vacation. Up to the end of July the Courts were frequented by the legal profession in the same way as for years. But when the Courts reassembled in October, there was a great diminution in the numbers present at the opening, and the Law Courts and Inns of Court seemed deserted when compared with the familiar scenes of July.

The legal profession was among the foremost to realise that the nation must take up arms whether previously trained thereto or not. Not all were placed in the dilemma of a firm of solicitors in the Midlands who with their male clerks were all enthusiastic Territorials. The

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*National War Administration (continued)*—

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| Minister for Home and Territories . . . | Hon. P. M. Glynn, K.C. |
| Vice-President, Executive Council . . . | Hon. L. E. Groom (to March 27, 1918). |
| Hon. Minister . . | Hon. G. H. Wise (from March 26, 1918). |

office reopened after the Bank Holidays with a staff of female typists and an office boy. Not very different was the case of the barrister who accepted a brief for a Monday, having been assured that his military services were not needed, and on the Saturday afternoon was ordered to report for duty at Plymouth at 8 o'clock on the Monday morning. Many of course were mobilised as Territorials and members of the Reserve of Officers, but most were civilians without military training. The Inns of Court and other similar corps were besieged by applicants, and at once formed waiting lists which ran into hundreds, many of them having by an easy conscience declared themselves to be under the then military age of 29. Others hurried from one recruiting office to another to find a unit where men of 30 would be received. A great number were engaged in winding up their affairs so as not to leave their dependents in want and confusion when finally they did go. In fact by the Michaelmas Term of 1914 all available lawyers of military age had either joined up, or were unfit for service, or were awaiting a favourable answer to their requests to serve. As time went on and the age-limit was raised, a continuous stream anticipated the call, so that the compulsion of the law, when it did at last come, found very few lawyers who had remained until the opportunity of volunteering had passed. It is said that no barrister and only one solicitor claimed exemption as a conscientious objector.

Each of the Inns of Court has preserved a record of service, but it is to be regretted that

IX. the system was not identical, and it is not possible to group them together.

From Gray's Inn there went into the Navy or Army 4 benchers, 193 barristers, and 187 students. Of these 44 (26 barristers and 18 students) lost their lives on service.

At the Inner Temple the figures are 2 benchers and 1047 barristers and students, of whom 254 were killed or died.

Lincoln's Inn sent into H.M. Forces 299 barristers and 71 students, and of these there were killed or died 42 barristers and 22 students.

The Middle Temple was represented by 318 barristers and 195 students, and of them 76 made the sacrifice of their lives.

The totals of men serving are 2197, and of those killed 438, but a few were members of more than one Inn, and the actual totals are therefore a little less.

Only one, a barrister of the Inner Temple, gained the V.C. He was killed in 1918. Hundreds gained military decorations and were mentioned in despatches. One member of the Inner Temple served in the U.S. Navy.

The solicitors have an equally proud record. 3847 solicitors served, of whom 640 fell. Of the 1685 articled clerks who joined the colours, 436 lost their lives.

The total of English lawyers who took service in H.M. Forces was therefore 7729. The proportion of members serving to those actually engaged in, or preparing for, the pursuit of the law is at least as high as, and in all probability higher than in any other occupation.

It is extremely difficult to obtain accurate statistics from the Dominions and Allies, for no systematic attempt to collect and arrange the statistics appears to have been made. In some countries universal military service operated so as to take all lawyers who were fit for service and of the regulation age, and therefore it is not easy to differentiate lawyers from any other profession or occupation. In other countries the service was voluntary, but the necessary information is on the attestation forms and files and has not yet been extracted. In the case of Belgium, the difficulty of obtaining such information comes naturally by reason of the rapidity with which the Germans overran the country when they began their unprovoked invasion. Many no doubt were killed without their services being expressed in any professional activities, and many others again were prevented by the German occupation from offering their services. The only figures available relate to Brussels. 197 advocates out of the 800 practising there are known to have served.

In France, universal military service naturally resulted in all advocates of military age and fitness rejoining the colours on mobilisation. Separate statistics recording their services are not available, and the organisation of the Bar in France is so decentralised that no one society can claim all barristers as members, so that a full list has not been prepared. The Paris Bar sent upwards of 1200 members to the colours, of whom 231 were killed and over 600 were wounded.

IX. The number of Italian advocates who served during the War was 5294.

In the Dominions the necessary information seems to have been filed on the record of the individual, and consequently, in the absence of voluntary effort, such as that which has produced the lists of the Inns of Court and Law Society in England, it will not be possible to give any figures of value until the files have been analysed and such statistics compiled.

It was not only in actual service that lawyers were of use to the State. Practically every lawyer who was debarred from joining the forces was called upon to render assistance to the State. Many abandoned practice during the War and occupied administrative positions. Many without completely abandoning practice gave all their available time to such work. It was not only in the field of law that they worked. Many served on technical committees; others undertook manual labour in munition factories or in the making of splints and other medical and surgical appliances for the wounded, or served in the Special Constabulary or Volunteers. Indeed, it may be said that all lawyers gave wholeheartedly their knowledge and skill in any field which seemed likely to advance the common cause.

END OF VOL. I

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